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HAROLD B. WILLEY,

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 321

BRADLEY MINING CO., a corporation,

Petitioner,

vs.

EDWARD H. BOICE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRADLEY MINING CO.,
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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the order of the Division of the United States Court of Appeals for the Ninth Circuit denying a rehearing and rehearing en banc entered in the above entitled case on June 24, 1953 (R 2328 ff.), and the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on December 5, 1951 (R 2225). The reasons for the presentation of this petition may be summed up in the language of one of the judges in the court below—"For as I see it, both the trial judge and the judges of this court, have simply refused to function." (R 2333)

OPINIONS BELOW

The opinion of the United States District Court for the District of Idaho, Southern Division, denying Motion for New Trial (R 116 ff.) is reported in 92 Federal Supp. 750. The first majority and dissenting opinions[1] of a panel of three Judges of the Court of Appeals (R 2204 ff.) is reported in 194 Federal 2d 80. The majority and dissenting opinions of the same judges denying petitioner's application to vacate the denial of its petition for rehearing and to reinstate the petition (R 2300 ff.) are reported in 198 F2d 790. The prior opinion of this Court in this case appears in 345 U.S. 932. The majority and dissenting opinions of the panel of three Judges of the Court of Appeals that originally decided the case, denying rehearing en banc after reversal and remand by this Court, (R 2328 ff.) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 5, 1951 (R 2225). A petition for rehearing and rehearing en banc, filed in time, was denied on January 23, 1952 (R 2226). An application to vacate this denial and reinstate the petition was entertained and denied August 27, 1952 (R 2299). On April 13, 1953, this Court, on rehearing, granted a writ of certiorari, vacated the order of the Court of Appeals denying petition for rehearing en banc, and remanded the case to the Court of Appeals for further proceedings in the light of *Western Pacific Railroad Corporation v. Western Pacific Railway Company,* October Term 1952, Nos. 150 and 160, 345 U.S. 247.

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1. For the convenience of this court the three opinions of the court below are set forth in appendices A, B and C attached hereto.

On May 12, 1953, and after the decision by this Court of the Western Pacific Case and this case, appellant filed with the Court of Appeals a supplemental petition for rehearing and memorandum of Appellant's suggested reasons for rehearing en banc (R 2311 ff.). As a result of the decision by this Court in the Western Pacific Case the Court of Appeals on May 27, 1953, adopted its amended Rule 23 governing procedure with respect to rehearings en banc.

This rule, as amended, so far as pertinent here, provides:

> "All petitions for rehearing shall be addressed to and determined by the court as constituted in the original hearing.
>
> "Should a majority of the court as so constituted **grant a rehearing**[2] and either from a suggestion of a party or upon its own motion be of the opinion that the case should be heard en banc, they shall so inform the Chief Judge. The Chief Judge shall thereupon convene the active judges of the court and the court shall thereupon determine whether the case shall be reheard en banc."

On June 24, 1953, the Division of the Court of Appeals, as constituted in the original hearing, one judge vigorously dissenting, denied Petitioner's petition for rehearing en banc or otherwise (R 2328 ff.). Opinion not yet reported (App. C).

The jurisdiction of this Court is invoked under Title 28 U.S.C.A. Sections 1254(1) and 2101(c). It is sustained by the *Western Pacific Case,* above, this Court's decision in this case, and the *Johnson and Moquin Cases,* below.

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2. All emphasis by use of bold face type is ours.

QUESTIONS PRESENTED

(1) Whether the trial court's ~~falure~~ failure to exercise its constitutional powers and perform its duty to pass judgment by giving relief on motion for new trial should be corrected because the trial court misconceived its function?

(2) Whether the decision of the Court of Appeals in this case, which, in actual and practical effect enunciates a rule of trial practice for other litigants in other situations and permits the use of grossly unfair and prejudicial tactics for the purpose of inducing passion and prejudice into the case without penalty shall be permitted to stand?

(3) Whether, in the trial of a case in a United States Court, counsel may, with impunity, indulge throughout the trial in a planned and consistent scheme of appeals to passion and prejudice of the jury?

(4) Whether, when such a departure from the accepted and usual course of judicial proceedings has resulted in a grossly excessive verdict, that verdict can be permitted to stand?

(5) Whether the decisions of this Court in *N.Y.C. Ry. Co. v. Johnson,* 279 U.S. 310, 73 L. ed. 706, and *Moquin v. Minneapolis, etc. Ry. Co.,* 283 U.S. 520, 75 L. Ed. 1243 are to be emasculated and brushed aside by assuming the jurors were not misled by constant appeals to passion and prejudice through the introduction of inflammatory matter under the guise of unsupported 'impeachment' cross-examination upon the assumption that jurors have intelligence enough to know (a) that if a party has evidence to impeach a witness he will produce it and (b) that statements, in the form of impeaching questions, in support of which no evidence was produced, were to be disregarded—when a grossly ex-

cessive verdict demonstrates that the assumption is wholly unwarranted?

(6) Whether the rule adopted by the Court of Appeals for the disposition of petitions or suggestions for rehearings en banc and the summary denial of appellant's petition for a rehearing en banc by two members of the Division which originally heard the case complied with the pronouncements by this Court in the *Western Pacific Case*?

(7) Whether the rule adopted by the Court of Appeals of the Ninth Circuit for the disposition of petitions for rehearings en banc being in conflict with the practice of the Court of Appeals for the District of Columbia and the United States Court of Appeals for the Third Circuit creates a situation which calls for the exercise of this Court's power of supervision? (14 F.R.D., Advance Sheets 91).

STATEMENT

In the original petition for certiorari which, on rehearing, was granted without limitation, the nature of the case was stated. For convenience and completeness here we repeat that statement.

Respondent brought this action against Bradley Mining Co. and John Bradley, its Executive Vice-President, for $50,000 for damages for false imprisonment and $100,000 damages for slander (R 3-13). No special damages were alleged or proved. The cause was concluded in favor of the individual defendant (R 2187) and by a verdict against the corporate defendant, the petitioner here, for $60,000 (R 109). Motion for new trial was denied (R 116 ff.). The appeal to the Court of Appeals for the Ninth Circuit was submitted to a panel of three—Judges Healy, Bone and

Pope. The judgment was affirmed by two judges—Judge Pope dissenting (R 2204 ff.; Appendix A hereto). A petition for rehearing and a hearing en banc before the seven judge court was filed and denied by the same two judges who had affirmed the judgment (R 2226). The dissenting judge's characterization of the whole case was:

> "In my opinion a very thin case has here been whipped into a monstrosity".

The dissent was on the ground that the verdict was excessive and was the result of appeals to passion and prejudice, which that opinion states and documents in detail. The most that the majority could say of this conduct of counsel was:

> "One need not approve tactics of this sort in order to reject appellant's argument."

These opinions are set forth in 194 F.2d 80 (App. A).

To understand the point of the foregoing a summary statement of matters which occurred over a period of more than nine months and which were made to appear at a five-week trial is necessary.

Stibnite is a small mining town in a remote region of the mountains of Idaho. The streets and alleys were public but the rest of the property was owned by Bradley Mining Co. and, with one or two exceptions, the inhabitants were employees of the company or members of the families of employees. The employees, in matters of common concern, dealt with the company through a formally constituted "Employees' Representative Committee" (R 374-384, 405, 406).

Agreeably to the Idaho statutes (Idaho Code 72-397 to 72-309) the company and the employees had entered into a

contractual plan for medical service, and a second plan covering wives and children of employees. In 1943 the company opened a hospital at Stibnite. All the company's employees and members of their families were members of the medical plans.

Respondent, a doctor licensed to practice in Texas, and a stranger to Stibnite, began service March 1, 1947, as the doctor in charge of the Stibnite Hospital. At first he seemed to do well enough. But at the end of about three months marked laxity and inattention to duty began to manifest itself. The record is filled with general statements and specific instances in too much detail for summary here. Patients' complaints began in July. Eventually the matter was taken up by the Employees' Representative Committee. In November, it adopted a resolution, critical of the doctor. It and company officials conferred with the doctor. The situation was not cured. There were further conferences with the Employees' Representative Committee, unfulfilled promises to improve, and additional complaints. The situation got progressively worse. Respondent's conduct became erratic and bizarre. In January, petitioner took steps to find a new doctor.

Respondent's inattention to duty and complaints from patients and nurses continued. Because of respondent's conduct one registered nurse resigned on February 14, 1948. On March 31, 1948, due to respondent's behavior, the registered nurse who had been head nurse at the hospital since its inception resigned and the hospital was without a registered nurse for 22 days. Two new registered nurses came in. Still the hospital was not operated properly. The men at the mill began circulating a petition to have the

doctor removed. Respondent's employment was terminable on 60 days notice (Ex. No. 10, 11, R 225, 232) and finally, on April 30, 1948, petitioner was forced to give respondent 60 days notice of termination (Ex. No. 2, R 196).

Immediately thereafter, in the early part of May, respondent performed an operation on a Mrs. Bishop in which there was a shocking want of proper technique and care. *On May 13, the doctor performed an operation on a Mrs. Wood in which he removed a living fetus—which, by his own admission he later secreted in his apartment, placed in a pickled peach jar and buried in the ground.* His own testimony was that he did not know that the woman was pregnant. But see Judge Pope—"One of the nurses protested before the operation that the woman appeared to be pregnant, but the doctor, without making any tests for pregnancy, nevertheless proceeded with the operation." (App. A, p. 9).

On the morning after the Wood operation, the head nurse made a complete report to the company officials and also stated that respondent was contemplating a similar operation on another pregnant woman in the hospital. We make reference here to Judge Pope's judicial statement as to the sequence of events (App. A, p. 10):

> "The head nurse testified that another patient in apparently the same condition as the woman thus operated upon was then in the hospital awaiting a similar operation. The nurse became much agitated about the incident just described and she went to the officials of the company advising them that in her opinion some "mad surgery" was going on; that the Mining Company was likely to be held responsible for some of the consequences and that the doctor should be removed from his responsibilities at once.

It was following this report that the Company officers called the Idaho Department of Public Health which immediately sent a representative of the department and a physician member of the Hospital Advisory Board to Stibnite. The company officials then approached Dr. Boice, and in the presence of these persons demanded that he quit his employment and that he leave town at once. It was in the course of the ensuing argument with Dr. Boice that the company officers are said to have expressed the opinion that the doctor was mentally ill and insane and to have stated he had performed an illegal operation.

The charge of slander arises out of these remarks. At first the doctor declined to accede to any termination of his employment and stated that he proposed to continue. It was then that a guard was stationed at the door leading from the apartment to the hospital to keep the doctor from entering the hospital. It was claimed that at the same time guards were placed near other outside doors of the apartment to prevent the doctor from leaving the apartment at all. It is not claimed that the imprisonment lasted more than a few hours, for during the evening following the time mentioned the doctor and his wife left the apartment and went about the town without any difficulty or interference. After some argument which followed the demand for Dr. Boice's immediate departure, he was finally paid compensation for a sixty day period which included compensation for the loss of the use of the apartment, and the doctor and his wife took their belongings and left Stibnite".

Judge Pope further states "The evidence of imprisonment was exceedingly flimsy". (App. A, p. 11)

As to the claimed slander, in addition to the above characterization of respondent's "mad surgery", four disinter-

ested graduate registered nurses gave detailed testimony regarding respondent's inexplicable and frequent erratic and eccentric conduct and demeanor. This testimony—corroborated by many other witnesses—was neither denied nor impeached in any manner.

In this connection Judge Pope found (App. A, p. 12):

> "But, with respect to the amount of damages, the Mining Company had the right, under the Idaho statute, to show the matters testified to by the nurses by way of mitigation. What impresses me is that the testimony of these four graduate registered nurses was not impeached in any manner. They were wholly disinterested when they testified, none of them is shown to have had any motive to misrepresent, and what is more, their testimony was not even denied. Under these circumstances, I think the court was obliged to assume that their testimony was true and, if it was true, *there was assuredly something gravely wrong about the conduct of the appellee doctor in and about the performance of his duties.*
>
> I think also it cannot be questioned but that when these matters were called to the attention of the Mining Company, its officers were justly and reasonably alarmed about the situation in view of the company's responsibility under its hospital management. The company officers would properly assume that the training in discipline of a graduate nurse is such that she would not be likely to question a doctor's actions unless his conduct had become actually shocking. . . .
>
> *I would be inclined, without more, to say that the verdict of $60,000 under the circumstances of this case is grossly excessive and monstrous.*" (Emphasis ours).

There was not a word of testimony which would support any finding of damage in fact. The chief actor in the epi-

sode over the weekend of May 14-16, 1948, for petitioner, was its Executive Vice-President, Mr. Bradley. The jury returned no verdict as to him and by stipulation the case was disposed of in his favor.

The jury, however, returned a verdict of $60,000 against the petitioner corporation—Why? The obvious answer of jury prejudice against the company lies in the tactics of respondent's counsel.

During the whole course of the trial the attorneys for respondent, in cross-examination ostensibly for the purpose of impeachment, introduced matters derogatory of petitioner before the jury—for which there was no evidence—for which they never attempted to produce any evidence—thus introducing by "impeachment" highly inflammatory matters whose only purpose could have been to create jury prejudice.

See Judge Pope (App. A, p. 13, 14):

> "In my opinion the record is so filled with matters improperly injected on behalf of appellee as to demonstrate what I can only conclude were deliberate efforts to make appeals to the passion and prejudice of the jury. One of these instances is mentioned in the opinion of the majority, who apparently treated it as an isolated instance, of trifling consequence. I do not so read the record."

This "isolated instance of trifling consequence" was the interjection of religious prejudice on cross-examination carrying the totally unsupported insinuation that the mine manager had, in a conference with respondent, rejected an applicant for head nurse on the ground that she was Jewish and a Jewish refugee (R 1602, 1603):

"Q. She was a **Jewish refugee,** was she not?

A. I don't know.

Q. Isn't it a fact that you said Miss Hirst would not fit into the picture at Stibnite, and 'You better forget her'?

A. No, sir.

Q. You don't recall saying that—saying that inasmuch as she was **Jewish,** and a **Jewish refugee,** that she would not fit into the life at Stibnite and that you may as well forget her?

A. Nothing was said about being Jewish."

In a footnote, the majority stated (App. A, p. 3):

"In one instance, it is claimed that counsel attempted to inject a religious issue in the course of cross examination. We have considered this incident and regard it as of no more than trifling consequence. In any event it was not objected to at the time".

But how effective is an objection to cross-examination which apparently is for *impeachment* purposes? See the following cross-examination of Mr. Zarybnisky (R 1418, 1419):

"Q. Do you know Mr. and Mrs. Cliff Ross?

A. Yes, sir.

Q. Were they at your home on Saturday?

A. I don't remember.

Q. Were they at your home on Sunday?

A. They were at our home.

Q. Do you remember—on Sunday going into their home and in the presence of Mr. and Mrs. Cliff Ross and your wife, stating that you had just been told that 'Doc had gone crazy'?

"A. I don't remember.

Mr. Breshears: We object to this, there is no connection with management or any of the defendants here.

"Mr. Hawley: *It is for the purpose of impeachment.*
The Court: *You may ask for that purpose.*
Q. *Do you remember on that occasion that you said Doc had gone crazy, and that you had instructions to keep him under guards, and that you had instructions to shoot him down like a dog if he got funny?*
A. No, sir, I don't."

This it will be noted is an instance where the right of counsel for respondent to ask the question was challenged by objection, and counsel made the specific promise to the court that he would follow through with the necessary proof.

Neither Mr. nor Mrs. Ross, nor any other witnesses who were put on the stand, substantiated counsel's "purpose of impeachment" as promised the court. Counsel's purpose was obviously without foundation, to get over the effect of the *question* to the jury.

It is conceivable that one or two instances of inadvertent improper and inflammatory conduct could be overlooked. But the record in this case contains more than 50 similar appeals to passion and prejudice under the guise of "impeachment". Record references to these are set forth in Appendix D attached hereto. Judge Pope's opinion cites 20 specific examples and his conclusion is (App. A, p. 15):

> "The record here, however, shows a pattern of similar inquiries so repetitive, and so completely unsupported by any attempt to establish the suggested impeachment otherwise than by the mere asking of the questions, that the only fair conclusion, I think, is that they show a deliberate effort to inject, not by proof, but merely by innuendo, matters calculated to give rise

to passion and prejudice on the part of the jury. . . .

Many other similar instances are listed and complained of by appellant. In no instance was any effort made to prove, by calling any other witness, that the suggested prior contradictory statement, or statement disclosing bias, had actually been made. The conclusion seems unavoidable that such questions were not asked in good faith, or in belief that they referred to any actual occurrence, or that any such statements had actually been made, but rather that they were asked in a studied attempt to prejudice the jury by the innuendo which was certain to be the effect of the mere interrogation. . . .

The important fact is that this highly prejudicial matter was improperly before a jury which had produced a very large verdict. It serves to account for the size of the verdict. . . . It is all of the same stripe as the conduct of appellee's counsel in having a witness relate, without any showing that it related to this case, a purported conversation between two of appellant's officers in which one asked "Do you think his word would stand up?" And the other replied, "No, he is just a common laborer". In like manner, a witness was asked if she knew that when the Boices left, Mrs. Boice was pregnant. No one testified to such a pregnancy. I cannot escape the conclusion that this question, and the conversation about "just a common laborer", and the question about a company official rejecting a proposed employee because she was Jewish, were all dragged in merely for their likelihood to cite passion and prejudice.

A jury cannot be expected to make a calm, judicious and fair appraisal of damages in such an atmosphere. It is apparent that this one did not. Where an exces-

> sive verdict thus results from passion and prejudice, the error cannot be cured by remittitur. A new trial must be granted, for the means employed at the trial "may be quite as effective to beget a wholly wrong verdict as to produce an excessive one". Minneapolis etc. Ry. v. Moquin, 283 U.S. 520".

Judge Pope's finding of the existence of appeals to passion and prejudice is actually confirmed by the majority panel opinion—see App. A, p. 4):

> "The complaint is that the impeaching questions were not attempted to be followed up by evidence that the witness had in fact made the statement. One need not approve tactics of this sort in order to reject appellant's argument. We think that jurors are not so easily misled. They may safely be assumed to have intelligence enough to know that if a party has evidence tending to impeach an adverse witness he will produce it. In sum, the instances of claimed misconduct cited are not thought to have had a substantial tendency to inflame the jury."

The short answer to the brushing off by the majority of these inflammatory jury appeals is that respondent's counsel did *not* produce evidence to support *any* of these numerous "impeachments".

Furthermore, we urge that every litigant is entitled to a fair and impartial trial; that verdicts of jurors should be rendered only on the issues made by the pleadings and the evidence, and that—where prejudicial and inflammatory matter is injected into a record and appeals made to passion and prejudice—it cannot be assumed that jurors are not misled thereby.

We also urge that such misconduct having *any* tendency to inflame the jury should not be approved—the test should be not that the prejudicial matter had a "*substantial* tendency to inflame", but that it had *any* tendency to do so.

With deference to the majority, we submit that it is difficult to conceive of any more flagrant or "substantially inflammatory" appeals to jury prejudice.

The trial judge, in passing on the motion for new trial, misconceived his functions,—assumed that it had no power or function to pass on the facts and assumed that its function was like that of an appellate court. (This is made clear by an earlier order reversed in *Covey Gas & Oil Co. v. Checketts,* 187 F.2d 561 (Circ. 9) decided after denial of the motion for new trial in the case at bar.)

REASONS FOR GRANTING THE WRIT

(1) A grossly excessive and monstrous verdict has been induced by passion and prejudice and the Court below has decided on important questions of federal law,—that courts of appeal should afford no relief where an excessive verdict in a federal court has resulted from improper appeals to passion and prejudice by members of the Bar of the federal court in the course of the trial of a case,—in a way which is in conflict with *Minneapolis etc. Ry. Co. v. Moquin,* 283 U. S. 520, and *N.Y.C.R. Co. v. Johnson,* 279 U.S. 310. (Rule 38, 5(b).)

(2) The trial judge plainly failed to exercise his Constitutional powers and perform his duty to pass judgment by denying relief to appellant on motion for new trial upon the grounds that he had no power to set aside the verdict of the jury for the reason that he believed it to be excessive

and thus correct an injustice done by the jury.[3] Such mistaken renunciation of power on the part of the trial judge clearly deprives the appellant of a substantial right and calls for the exercise by this Court of its power of supervision. (Rule 38, 5(b); *Thiel v. So. Pac. Co.*, 328 U.S. 217, 225.)

(3) The decision of the Court of Appeals in this case, in actual and practical effect enunciates a rule of trial practice for other litigants in other situations which permits the use of grossly unfair and prejudicial tactics for the purpose of inducing passion and prejudice into the case without penalty.

(4) The rule adopted by the Court of Appeals for the disposition of petitions for rehearing en banc and the summary denial of appellant's petition for a rehearing en banc by two members of the division which originally heard the case does not comply with the decision of this Court in the Western Pacific case.

(5) The rule adopted by the Court of Appeals for the Ninth Circuit for the disposition of petitions for rehearings en banc is in conflict with the practice of the Court of Appeals for the District Court of Columbia and the United States District Court of Appeals for the Third District and creates a situation which calls for the exercise of this Court's power of supervision. (14 F.R.D., Advance Sheets 91).

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3. "The question is whether a litigant in a federal court is entitled to have the judges, both trial and appellate, exercise their constitutional power, and perform their duty, to pass judgment. Although this is a case which got in the federal court by reason of diversity of citizenship, in my view it poses an important federal question relating to the function of a trial judge. . . . For as I see it, both the trial judge and the judges of this court, have simply refused to function." (App. C)

We have stated the reasons for granting of the writ in the order in which they arose in the course of this case. Enlarging on these suggestions we turn to the last of these suggestions first.

After reversal by this Court of the order denying the application for rehearing en banc, the Court of Appeals again denied the application and rejected the suggestion that the case be heard en banc purporting to act under the Court's amended Rule 23. The heart of this rule appears in the first sentence of the last paragraph:

> "Should a majority of the court as so constituted[4] **grant a rehearing** and either from a suggestion of a party or upon its own motion be of the opinion that the case should be reheard en banc, they shall so inform the Chief Judge."

If the Court so constituted **grants a rehearing** and is of the opinion that the matter should be reheard en banc and so informs the Chief Judge, he is then to convene the active judges of the Court, and the whole Court will then determine whether the case shall be reheard en banc. Under this rule it is the full Court which is to make the final determination. But it has no opportunity to make such determination unless the Court as originally constituted on the hearing draws the matter to the attention of the Chief Judge and that Court is not to draw the matter to the attention of the Chief Judge, for determination by the full Court, **unless the Court as originally constituted grants a rehearing, i.e., is itself willing to rehear the case even if the full Court does not think it should be reheard en banc.** The rule in terms conditions consideration of a hearing en banc on

4. That is as constituted on the original hearing. See p. 3 above.

the division's willingness itself to rehear the case. This rule does not comply with the decision in the *Western Pacific Case.* In that case the majority opinion after an analysis of the statute (28 USC § 46(c)) in the light of its history, concluded that it was nothing more than a grant of power to courts of appeal to hear causes en banc. Significantly, the opinion did not stop with this. It went on:

> "But even if the statute grants only power plus the discretion for its exercise, that does not mark the end of our review of the en banc phase of this case. The en banc power, confirmed by § 46(c), is, as we emphasized in the *Textile Mills Case,* a necessary and useful power—indeed too useful that we should ever permit a court to ignore the possibilities of its use in cases where its use might be appropriate."

It was held that, appropriately, the exercise of the power might be delegated to a division of three judges. But the opinion makes it clear that these three judges in passing upon whether the case should be heard en banc are to perform a function entirely different from that which they would perform in determining whether they themselves, as a division only, would rehear the case. The opinion goes on:

> "And, recognizing the value of an efficient use of the en banc power, the Court should adopt such means as will enable its full membership to determine whether the court's administration of the power is achieving the full purpose of the statute so that the court will better be able to change its en banc procedure, should it deem change advisable."

Certainly, amended Rule 23 of the Court of Appeals for the Ninth Circuit does not even look in the direction of this requirement. To the contrary it seems to fly squarely in the

face of the statement of this court that while the power is to be used sparingly a court "may not take steps to curtail its use indiscriminately." But the real vice of Rule 23 is that it is squarely in conflict with the following holding in the *Western Pacific Case:*

> "Finally, it is essential to recognize that the question of whether a cause should be heard en banc **is an issue which should be considered separate and apart from the question of whether there should be a rehearing by the division.** The three judges who decide an appeal may be satisfied as to the correctness of their decision. Yet, upon reflection, after fully hearing an appeal, they may come to believe that the case is of such significance to the full court that it deserves the attention of the full court."

But under amended Rule 23 of the Court of Appeals of the Ninth Circuit the matter of hearing en banc cannot "be considered separate and apart from the question of whether there should be a rehearing by the division" **because no consideration is to be given to the question at all unless a majority of the Court as originally constituted "grant a rehearing."**

That this case was a proper one for independent consideration of rehearing en banc rests on something more than the assertion of counsel. The decision of the full Court of Appeals for the Ninth Circuit in *So. Pac. Co. v. Guthrie,* 186 F2d 926, as Judge Pope pointed out in his dissents, demonstrated a marked divergence of view among the judges of that court as to how the court should act in the face of grossly excessive verdicts. The "luck of the draw" put upon the division to which this case was assigned three of the four judges who would not act to give relief in the

Guthrie Case. Yet, in this case, Judge Pope, one of those four judges, was so impressed that the result here was outrageous that he dissented from affirmance of the judgment and it was he who pointed out that in the light of the views expressed by the judges in the *Guthrie Case* a rehearing en banc of the case in hand would produce a different result. (See App. B.) It is submitted that the procedure adopted by the Court of Appeals in this case is inappropriate as explicitly calculated to deprive the judges who dissented in the *Guthrie Case* of the opportunity of even knowing of the question pending in this case. (And compare the opinion of Mr. Justice Frankfurter in the *Western Pacific Case.*)

But there is more to this case than there was to the *Guthrie Case.* That was a case of mere excessiveness. This is a case of excessiveness induced by a planned course of appeal to passion and prejudice which the decision below would permit to stand in the face of the *Johnson* and *Moquin Cases,* above. Judge Pope's opinions find and document this course of conduct. The majority below, far from denying this, concede the impropriety of counsels' conduct. It is passed off with the bland assumption that although designed to affect the jury the design failed, and this in the face of an outrageous verdict in a case where, concededly, there was no proof or even claim of special damage.

One of the grounds invoked to sustain the result is that the trial "judge, familiar with the atmosphere of the trial and sensible to imponderables which might prejudicially affect the action of the jury, was satisfied that their verdict was motivated by the evidence alone and that it was not excessive." But in placing its reliance here the majority was really resting upon and giving approval to the trial judge's misconception of his own functions.

The trial court, after referring to constitutional provisions for trial by a jury said:

> "If this mandate is to be obeyed the court must proceed with caution when a motion such as is now before this court is considered, with the thought in mind that if the court is going to set aside the verdict for no reason except that the court feels it is excessive, this constitutional provision will be violated and a jury trial would be a useless thing if in the final outcome the court could supplant its opinion in place of the opinion of the jury."

Judge Pope, in his dissent from the decision of June 24, 1953, denying rehearing after remand by this Court, correctly appraised the action of the trial court as being not an exercise by it of a discretion vested in it but as a ruling that there was no such discretion and, by consequence, the court's action was a failure to perform the court's constitutional duty. Judge Pope, after quoting the language of the trial court quoted just above, appraised the situation as follows (App. C):

> "Most assuredly this is not the law. Murphy v. United States District Court, 9 cir., 145 F. 2d 1018, 1020; Charles v. Norfolk & Western Ry. Co., 7 cir., 188 F. 2d 691, 695; Felton v. Spiro, 6 cir., 78 F. 576, 581. And the trial court, proceeding upon this mistaken premise, after discussing the size of the verdict, concluded that 'the amount of damages allowed was the jury's best judgment,' (92 F. Supp. at p. 756)."
>
> "That the appellant was entitled to more than that, and that such mistaken renunciation of power by the trial judge is reversible error, was decided in Felton v. Spiro, supra, by a court of which Judges Taft and Lurton were members, in which it was said: 'But the motion for new trial is a remedy accorded to a party

litigant for the correction by the trial court of injustice done by the verdict of a jury. It is one of the more important rights which a party to a jury trial has. It is a right to invoke the discretion of the court to decide whether the injustice of the verdict is such that he ought to have an opportunity to take the case before another jury. If, now, in exercising this discretion, it is the duty of the court to consider whether the verdict was against the great weight of the evidence, and he refuses to consider the evidence in this light on the ground that he has no power or discretion to do so, it is clear to us that he is depriving the party making the motion of a substantial right, and that this may be corrected by writ of error.' (78 F. 581.)

"For this reason alone the case should have been reversed and remanded."

This aspect of the case presents a problem which though garbed as a matter of procedure is a vital matter of substance. No verdict would be permitted to stand against a party if he were deprived of the right to be represented at the trial by counsel. That right involves the right to be properly and adequately represented. A party is not so represented if his opponent is permitted to obtain a verdict by methods which have been condemned repeatedly.

And a party, whose case is tried by a jury, is deprived of his full rights to a trial where the trial court, misconceiving its function, does not, on motion for new trial, exercise its own independent judgment upon the case as matter of fact. This is its function and duty, and its function and duty is unlike that of an appellate court. (*Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 251; *Capital Traction Co. v. Hoff,* 174 U.S. 1; *Pleasants v. Fant,* 22 Wall. 116; *Aetna Casualty & Surety Co. v. Yeatts,* 122 F. 2d 350

(Circ. 4); *General etc. Ins. Co. v. Central Nat. Bk.*, 136 F. 2d 821, 823 (Circ. 6); *Reid v. Maryland Casualty Co.*, 63 F. 2d 10, 12 (Circ. 5). Where the trial court fails to perform its function it is guilty of an error of law which should be corrected on appeal. (*Felton v. Spiro*, 78 Fed. 567, 581 (Circ. 6—opinion by Taft, Lurton concurring, both later members of this Court); *General etc. Ins. Co. v. Central Nat. Bk.*, above; *Virginian Ry. Co. v. Armentrout*, 166 F. 2d 400, 408 (Circ. 4).)

CONCLUSION

The adoption of Amended Rule 23 in the Ninth Circuit obviously affects cases generally in that Court, establishes the practice for them and its correctness is a matter of importance far beyond the decision of this case. The Rule and its application in this case are in conflict with this Court's decision in the *Western Pacific Case.*

Countenancing a grossly excessive verdict obtained by a deliberate course of appeals to the passions and prejudices of the jury is likewise a matter which goes to the essence of methods of administration of justice in the Federal Courts. If the conceded misconduct here is to be condoned upon the ground that the jury, being sensible, was not influenced all point is taken from the decisions of this Court in the *Johnson* and *Moquin Cases.* The assertion is one which, with deference, no lawyer of real experience in the trial of jury cases would make.

Finally, apparently it is necessary for this Court again, in the exercise of its duty of supervising the administration of justice in the Federal Court, to announce the rule that the function of a trial judge, in a case tried with a jury, does not end with determining that there is evidence sufficient to warrant submission of the case to the jury but, upon

the return of the verdict, it is necessary for him to reappraise the case, give it his independent judgment and set aside the verdict whenever, in his own mind, an injustice has been done. This Court should again remind trial courts that they may not rest their denial of motions for new trial, as the trial court did in this case, upon the proposition "that the amount of damages allowed was the jury's best judgment." That it did this appears from the sentence immediately following where the trial court said: "This being true, the Court is of the opinion that it would not be justified in interfering with the jury's determination, and an order is filed in harmony with this opinion." It is submitted that the function of the trial court, on motion for new trial, is not to determine that the verdict is "the jury's best judgment" but its duty is to set the verdict aside unless in the Court's own mind the verdict is a **just** judgment, uninfluenced by improper considerations.

Dated: September 3, 1953.

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(Appendices follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

BRADLEY MINING COMPANY, a Corporation,
Appellant,

vs.

EDWARD H. BOICE,
Appellee.

No. 12,684
Dec. 5, 1951

Appeal from the United States District Court, for the District of Idaho, Southern Division

BEFORE: HEALY, BONE, and POPE, Circuit Judges

HEALY, Circuit Judge

This appeal is from a judgment against appellant in the amount of $60,000 in a suit claiming damages for slander and false imprisonment.

Much of appellant's argument here has been given over to factual contentions. The district judge in an opinion denying a motion for a new trial outlined the testimony supporting the verdict, 92 F. Supp. 750, and there is no occasion for our going over the same ground. All that need be said is that the evidence was such as to make the question of liability one for the determination of the jury. But appellant argues that in the form returned the verdict must be taken as a finding against appellee on all essential facts. Before turning to other points we will notice this claim.

In addition to the corporate appellant, its executive vice president, John Bradley, was made a defendant in the case. Bradley was personally in charge of all the Company activities giving rise to this suit. The verdict returned was against the Bradley Mining Company alone. It made no mention of John Bradley, either one way or the other. In this posture of affairs the court inquired of counsel whether they desired the jury to be returned to their room to clear up their verdict as regards Bradley. Both sides replied in the negative.

Counsel's point here is that the case was decided by the jury in favor of the defendant Bradley, hence all questions of fact which were touched by his activities have been determined against appellee. No Idaho authority is cited in support of the argument, nor are there any citations of analogous decisions from other jurisdictions. Appellee calls attention to the California case of Lloyd v. Boulevard Express reported in 249 P. 837. The situation there was in principle on all fours with the present. The corporate defendant was held liable by the jury but no verdict was returned against its active and responsible agent, Mitchell, who was also a defendant. The court remarked [p. 838] that "the jury did not find either for or against Mitchell. It is the settled law in this state that the verdict of a jury against one of two defendants is not a verdict in favor of the other defendant. Such a verdict indicates simply that the jury failed to find upon the issues." The court added that since the corporate defendant noticed the omission and did not ask that the jury be required to find on the issue, it could not now be heard to complain. The California rule would probably be followed in Idaho.

Appellant's principal argument aside from an appeal to the evidence appears to be that the verdict was excessive and was arrived at as the result of passion and prejudice. There was enough evidence, certainly, if believed, to warrant the imposition of general damages in more than a nominal sum, both on the issue of false imprisonment and on the slander issue. Appellee produced testimony that armed guards were for a number of hours placed about his apartment with the view of circumscribing his movements. Consult in this connection Griffin v. Clark, 55 Idaho 364. Charges of insanity and of the performance by appellee of an illegal abortion—charges obviously slanderous per se—were testified to have been made in the presence of members of the general public under circumstances which the jury might properly have found rendered them unprivileged. Too, the jury might fairly have inferred from the record that appellant acted with actual malice, both in respect of appellee's imprisonment and in respect of the slanderous statements of its representatives. Concededly, under the local rule, the existence of malice in fact in a case like this warrants the imposition of punitive damages.

Apart from the mere size of the verdict, the claim of passion and prejudice is predicated on questions put to several of appellant's witnesses in the course of cross examination. These questions consist mainly of inquiries whether the witness under interrogation had or had not made a certain statement tending to impeach his testimony.[1] In each instance the witness denied having made the state-

[1]In one instance it is claimed that counsel attempted to inject a religious issue in the course of cross examination. We have considered this incident and regard it as of no more than trifling consequence. In any event it was not objected to at the time.

ment. The complaint is that the impeaching questions were not attempted to be followed up by evidence that the witness had in fact made the statement. One need not approve tactics of this sort in order to reject appellant's argument. We think that jurors are not so easily misled. They may safely be assumed to have intelligence enough to know that if a party has evidence tending to impeach an adverse witness he will produce it. In sum, the instances of claimed misconduct cited are not thought to have had a substantial tendency to inflame the jury. The cause was submitted to them under elaborate instructions carefully defining the applicable law in terms as favorable to appellant as it could reasonably have asked. There were no objections to the charge on appellant's part.

The power of this court in respect of verdicts claimed to be excessive is not coextensive with that of the district court. At most we may consider only whether the verdict is grossly excessive or "monstrous." Southern Pacific Company v. Guthrie, 9 Cir., 186 F. 2d 926, 931-33. When the trial judge is presented, as the judge was here, with a motion for a new trial grounded on a claim of excessive verdict, his power to deal with such a claim is not limited as ours is to questions of law. He may set aside a verdict when he thinks it is against the weight of the evidence or for other reasons he deems sufficient. In this instance the judge, familiar with the atmosphere of the trial and sensible of imponderables which might prejudicially affect the action of the jury, was satisfied that their verdict was motivated by the evidence alone and that it was not excessive. On the record before us, certainly we can not say that he was wrong.

Counsel argue that the court prejudiced their case by criticizing a hypothetical question propounded to medical

witnesses whose opinion was sought as to whether appellee had practiced medicine in accordance with standards obtaining in Idaho. The hypothetical inquiry was unusually lengthy. The court in the presence of the jury expressed the belief that it included a number of matters that could be of no aid to the witnesses in forming an opinion. Counsel now say that the court's remarks "not only destroyed the value of the expert medical testimony given in response to the hypothetical question, but also discredited the supporting testimony which practically constituted appellant's entire defense." Yet counsel made no such suggestion at the time or indeed at any time while the case was before the district court. They did not ask that a mistrial be declared, nor did they subsequently advance the remarks of the court as a ground for granting their motion for a new trial. We have nevertheless studied the hypothetical question and considered the judge's comments concerning it. The comments, we think, were not unwarranted. The question propounded appears argumentative, and it included, as the court observed, a number of matters that could not conceivably be of aid to a medical man in forming an opinion on the subject inquired about. Moreover the judge instructed the jury to disregard his remarks.

One other point will be noticed briefly. Appellant is a California corporation doing business in Idaho, and its co-defendant, Bradley, is a resident of California. The complaint alleged and the answer denied that plaintiff is a citizen and resident of Idaho. It is argued that no proof whatever was offered as to his being a citizen of that state or any other state, hence the requisite diversity was not shown.

There was no proof directed immediately to the issue, but we think it sufficiently appears from the record as a whole that appellee was domiciled either in Idaho or in Texas.[2] The evidence is that he was raised in the latter state and after schooling was admitted to practice medicine there. During the second world war he entered the armed services and was discharged in October 1946, after which he sought a location in the northwest. In January of 1947 he entered into a contract of indefinite duration with appellant to take charge of the latter's hospital at Stibnite, Idaho. Following the making of this arrangement he returned to Texas to get his wife and children and to await the effective date of his employment, which was to be March 1, 1947. At that time he removed to Stibnite with his family and possessions, and resided there until May 15, 1948, when his contract was terminated by the company. At the inception of this employment he had applied for a license to practice medicine in Idaho and later was licensed by the state as a physician and surgeon. It casually appears from various items of evidence in the record that following his discharge at Stibnite he resided in Boise, where he was living at the time this case was filed and thereafter. Proof of residency in a state is usually thought prima facie evidence of domicile sufficient to shift the burden of proof. Cf. Kelleam v. Maryland Casualty Co., 112 F. 2d 940; Sherman v. Roosevelt Co., 48 F. Supp. 434; Tudor v. Leslie, 35 F. Supp. 969.

Affirmed.

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[2]The whole record may be looked to on this subject. Sun Printing & Publishing Assn. v. Edwards, 194 U. S. 377. There was enough proof, we think, to satisfy the jurisdictional requirement.

POPE, C. J., dissenting.

The circumstances which gave rise to this action took place in connection with the termination of the employment of the appellee, a physician and surgeon, who had been employed by the Bradley Mining Company. The Mining Company operated mines at Stibnite, a remote mining town located in the mountains of Idaho. It had a contract with its employees under which it arranged to provide hospital and medical care not only in cases arising out of industrial accidents, but in all cases of illness of the employees or any members of their families. To accomplish this it had established and equipped a hospital, and Dr. Boice, the appellee, had been employed to manage the hospital and to provide the medical and surgical care required. The appellee was the only physician in the community.

The work in the hospital was handled by a number of nurses, selected by the doctor, but paid by the Mining Company, and there were generally at least two who were graduate registered nurses. Dr. Boice and his family were furnished an apartment which was directly connected with the hospital.

At the time of the trial all of the graduate registered nurses, who had been employed in the hospital during Dr. Boice's management, testified. At that time none of them was any longer employed by or connected with the hospital or the Mining Company. Their testimony was all to the effect that it was exceedingly difficult to get the doctor to see patients who came to the hospital for advice or treatment; that on many occasions he refused to see or interview such patients; that on occasions employees injured in serious industrial accidents were brought to the hospital and

the doctor refused to go near them for a period of several days; that he did not make regular rounds of the hospital to inspect those hospitalized there; that he insisted in giving oral directions for treatment and medication to the practical nurses and generally declined to give such instructions either to the head nurse or other graduate registered nurses in writing or by entries on the charts; that while he thus absented himself from the hospital he remained in his apartment and refused to see patients even when the nurses sought him out and requested his presence. During such times his wife, who was neither an employee nor a physician, made the hospital rounds in her husband's stead and undertook to give orders for treatment of the patients. The nurses testified as to how the doctor would schedule operations for morning hours, and then, after the patient had been prepared and wheeled into the operating room at the appointed time, the doctor would not appear until long after noon, and sometimes not at all on the appointed day.

The nurses testified that when it was necessary to procure directions from the doctor, they would proceed to the apartment in order to talk to him and that frequently the doctor was in the bathroom with the door closed, where he remained for long periods of time, and that they had to consult with him through the closed bathroom door. The nurses complained to Dr. Boice about the difficulty of procuring proper directions and about his refusal to see immates and callers at the hospital but the situation did not improve. At times when the doctor was in the hopsital and he was approached by a nurse in order to have him interview a patient, he climbed out of the window to get away from the

nurse and avoid the interview. Some of the nurses furnished additional details, such as the doctor's permitting his children, his dog, and his pet ducks to wander about the hospital.

Finally, some of the nurses reported the unsatisfactory condition to the Mining Company officers stating they proposed to resign. They were requested to stay until some replacement could be found for Dr. Boice. The contract of employment provided for termination of his two year term at any time on 60 days notice, and on April, 1948, he was given such notice.

Early in the following month he performed an operation said by him to be exploratory in character upon a woman who he said was suspected of having malignant cancer or tumor of the uterus. One of the nurses protested before the operation that the woman appeared to be pregnant, but the doctor, without making any tests for pregnancy, nevertheless proceeded with the operation. He performed a hysterectomy and removed the uterus which was found to contain a fetus which moved and kicked. The doctor admitted that he had not known that the pregnancy existed when the operation was performed, and the only point in controversy with respect to this operation was as to whether it was a six month or only a three month old fetus. The graduate registered nurses who were present and who saw the fetus and who had some years of training and experience in obstetrical techniques, testified that it was apparently a six-month fetus. The doctor proceeded immediately to dissect the uterus. The nurses were present as was a four year old child of the doctor during this procedure. Immediately thereafter the specimen disappeared

and although in a short while much controversy arose about the operation, the specimen was not exhibited to any other person. The doctor admitted that he kept it in alcohol until after he left Stibnite, and that he buried it in the vicinity of a ranch where he stopped on his way out following his discharge.

The head nurse testified that another patient in apparently the same condition as the woman thus operated upon was then in the hospital awaiting a similar operation. The nurse became much agitated about the incident just described and she went to the officials of the company advising them that in her opinion some "mad surgery" was going on; that the Mining Company was likely to be held responsible for some of the consequences and that the doctor should be removed from his responsibilities at once.

It was following this report that the company officers called the Idaho Department of Public Health which immediately sent a representative of the department and a physician member of the Hospital Advisory Board to Stibnite. The company officials then approached Dr. Boice, and in the presence of these persons demanded that he quit his employment and that he leave town at once.[1] It was in the course of the ensuing argument with Dr. Boice that the company officers are said to have expressed the opinion that the doctor was mentally ill and insane and to have stated he had performed an illegal operation.

The charge of slander arises out of these remarks. At

[1]Stibnite was a "company town" in the sense that substantially all of its inhabitants were company employees and their families, and substantially all of the houses and buildings were company owned.

first the doctor declined to accede to any termination of his employment and stated that he proposed to continue. It was then that a guard was stationed at the door leading from the apartment to the hospital to keep the doctor from entering the hospital. It was claimed that at the same time guards were placed near other outside doors of the apartment to prevent the doctor from leaving the apartment at all. The doctor himself testified that there were guards on those other sides of the apartment, but his wife gave no such testimony and other persons who were there saw no guards other than the one at the entrance of the hospital.

The charge of false imprisonment is predicated upon this claim that the apartment was surrounded by guards, and that when Dr. Boice and his family drove out of town the following Sunday night, an employee of the company followed to make sure that they did leave. It is not claimed that the imprisonment lasted more than a few hours, for during the evening following the time mentioned the doctor and his wife left the apartment and went about the town without any difficulty or interference. After some argument which followed the demand for Dr. Boice's immediate departure, he was finally paid compensation for a sixty day period which included compensation for the loss of the use of the apartment, and the doctor and his wife took their belongings and left Stibnite.

I have no difficulty in going along with the majority and with the trial judge upon the proposition that there was some evidence to prove an imprisonment[2] and that the

[2]The evidence of imprisonment was exceedingly flimsy. I do not think there was any, but of course I am not a fact finder here.

defamatory remarks made in the presence of the Health Department representatives could be said to have been made before persons with respect to whom the rule of privilege would not operate.

But, with respect to the amount of damages, the Mining Company had the right, under the Idaho statute, to show the matters testified to by the nurses by way of mitigation.[3] What impresses me is that the testimony of these four graduate registered nurses was not impeached in any manner. They were wholly disinterested when they testified, none of them is shown to have had any motive to misrepresent, and what is more, their testimony was not even denied. Under these circumstances, I think the court was obliged to assume that their testimony was true and, if it was true, there was assuredly something gravely wrong about the conduct of the appellee doctor in and about the performance of his duties.

I think also it cannot be questioned but that when these matters were called to the attention of the Mining Company, its officers were justly and reasonably alarmed about the situation in view of the company's responsibility under its hospital management. The company officers would properly assume that the training in discipline of a graduate nurse is such that she would not be likely to question a doctor's actions unless his conduct had become actually shocking.

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[3] "In the actions mentioned in the last section, the defendant may in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances." Sec. 5-811, Idaho Code.

The testimony of these nurses did not stand alone. It was corroborated by the testimony of several of the practical nurses, and the doctor's inattention to his work and many of the inexplicable aspects of his often erratic and eccentric conduct and demeanor were testified to by many former inmates of the hospital. Many of these patients were at the time of the trial either company employees or members of their families, but it is noteworthy that in general the circumstances related by them were not denied. The doctor himself was not called upon rebuttal after all this testimony had been adduced.

I would be inclined, without more, to say that the verdict of $60,000 under the circumstances of this case is grossly excessive and monstrous. As I read the testimony I think it is apparent that when Dr. Boice was told to leave, the officials of the company who talked to him were not only alarmed but had become so excited that under the circumstances their method of approaching the doctor and demanding his departure was more abrupt and undiplomatic than it needed to be. I think that the only circumstances from which malice could be inferred in order to support an award of punitive damages is this unnecessarily harsh method of putting pressure upon him to leave, but I assume that there was sufficient evidence of malice to sustain an award of punitive damages, although the inference of lack of malice, I believe, is the stronger. Even assuming a permissible inference of malice, I think the award a monstrous one, wholly apart from the circumstances which I am about to mention.

In my opinion the record is so filled with matters improperly injected on behalf of appellee as to demonstrate what

I can only conclude were deliberate efforts to make appeals to the passion and prejudice of the jury. One of these instances is mentioned in the opinion of the majority, who apparently treated it as an isolated instance, of trifling consequence. I do not so read the record.

For instance, appellee's counsel no doubt felt that they should in some manner undertake to break down the effect of the testimony of the nurses to which I have referred. They proceeded to do this by propounding to each of them certain questions, which, if answered in the affirmative, would have disclosed that the nurse in question was very biased against the doctor, or had made prior statements contradictory of her present testimony. Thus Miss Morton, the nurse who had reported the operation to the company officials, was asked: "Miss Morton, immediately after your arrival on the 29th of April or the next day, or within a day or two, you started to criticize Dr. Boice to other nurses, did you not?" She was also asked: "Were you not also talking to the patients and criticizing the doctor's treatment of the patients?" Both of these questions were answered "No, sir", and in answer to the second, the witness said "I used all the excuses I could manage to cover up for Dr. Boice not seeing his patients". Now, if counsel was possessed of any evidence of any such conduct on the part of Miss Morton as that suggested by the question, which would have tended to show substantial bias on her part, proof of that fact would have been admissible. Collinger v. United States, (7 cir.) 50 F. 2d 345; United States v. Beekman, (2 cir.) 155 F. 2d 580; 3 Wigmore Evidence (Third Edition) § 1022. But no such testimony was adduced.

If only those two questions were involved, it is clear that their asking would be entirely proper, whether followed

by other proof or not. I think it would be taken that counsel would be presumed to have asked them in good faith.

The record here, however, shows a pattern of similar inquiries so repetitive, and so completely unsupported by any attempt to establish the suggested impeachment otherwise than by the mere asking of the questions, that the only fair conclusion, I think, is that they show a deliberate effort to inject, not by proof, but merely by innuendo, matters calculated to give rise to passion and prejudice on the part of the jury.[4]

The cross-examination of the other nurses followed the same pattern.[5] It was extended to other witnesses. A guard

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[4]Thus, still proceeding with the cross-examination of Miss Morton, she was asked: "Didn't you tell Mr. Provost [a hospital patient] that he should sue the doctor for malpractice?" Also, she was asked: "When the doctor asked you to leave didn't you tell him at that time that you were not working for him, and that he could not fire you, that you were working for Mr. Bailey?" Also: "Did you tell Helen Christensen that you were not employed by Dr. Boice but were employed by Mr. Bailey?" In each case the answer was in the negative. Some of the suggestions in these questions to Miss Morton were repeated in questions to other nurses. Mrs. Anaruk [formerly Miss Haskins] was asked: ". . . Were you ever present, during your period at the Stibnite Hospital, when Miss Jeanne Morton made statements to Mr. Provost criticizing Dr. Boice when Dr. Boice was not present?" The same witness was asked if Miss Morton had not told her she was hired "for the purpose of constantly checking on Dr. Boice and reporting back to [company officers]". Mrs. Richardson was asked: "Do you know whether or not Miss Morton, during that entire period, was extremely critical of Dr. Boice to you and the practical nurses and also the patients involved?"

[5]Nurse Anaruk was twice asked whether she had not, shortly after Dr. Boice left, stated to one Faye Anderson, that she "had never seen anything like the treatment accorded Dr. Boice by the Bradley Mining Company or their agents", and that she was going to quit because she "did not like the way they treated Dr. Boice". Nurse Lee was asked if she, about that time, did not go to Dr. Boice to express her sympathy, and did not then say "he was the best surgeon [she] had ever known". Nurse Kirshner was asked if she had not made two purported statements. If these statements had been made they would have indicated that this nurse told a Mr. Sims, while he was in severe pain, to get up and get out of the hospital, and that she made a similar statement to a Mrs. Baker,

stationed at the hospital door was asked about a conversation with a Mr. and Mrs. Ross. He was then asked: "Do you remember on that occasion that you said Doc had gone crazy, and that you had instructions to keep him under guard, and that you had instructions to shoot him down like a dog if he got funny?" Martin, the county attorney, was asked on cross-examination if he did not state to Dr. and Mrs. Boice that "it was silly for them to fight Mr. Bradley and his money."

These instances will serve to illustrate the method of cross-examination adopted by the doctor's counsel. Many other similar instances are listed and complained of by appellant. In no instance was any effort made to prove, by calling any other witness, that the suggested prior contradictory statement, or statement disclosing bias, had actually been made. The conclusion seems unavoidable that such questions were not asked in good faith, or in the belief that they referred to any actual occurrence, or that any such statements had actually been made, but rather that they were asked in a studied attempt to prejudice the jury by the innuendo which was certain to be the effect of the mere interrogation. As the Supreme Court of Montana said of a somewhat similar procedure, "Manifestly it was the questions and not the answers which counsel considered important." State v. Patton, 102 Mont. 51, 59, 55 P. 2d 1290, 104 A.L.R. 76. Cf. United States v. Nettl, (3 cir.) 121 F. 2d 927.

When the evidence came to a close and it then became apparent that appellee did not intend to produce witnesses

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hospitalized for hypertension. The same nurse was asked if there was not friction between herself and the head nurse, Mrs. Johnson. Nurse Johnson was asked if she had not said of Nurse Kirshner that the latter "was in disgrace in the nursing profession".

to prove the statements thus insinuated in the questions, appellant might well have moved the court to direct the jury to disregard the questions. The Idaho court has held that without such a motion, the asking of the questions, or the failure of the court so to instruct, is not ground for reversal,[6] although that court has labeled such a procedure as that indulged in by appellee's counsel here, as "unfair to a defendant", a practice which "ought not to be indulged in under any circumstances", State v. Boyatt, 59 Ida. 771, 784, 87 P. 2d 992, and as a "reprehensible practice", State v. Flitton, 52 Ida. 374, 379, 15 P. 2d 397.[7]

But as I read this record, I think it immaterial whether appellant, by not making such a motion, lost the right to demand a new trial for misconduct of counsel as such. The important fact is that this highly prejudicial matter was improperly before a jury which has produced a very large verdict. It serves to account for the size of the verdict. It is all of the same stripe as the conduct of appellee's counsel in having a witness relate, without any showing that it related to this case, a purported conversation between two of appellant's officers in which one asked "Do you think his word would stand up?" And the other replied, "No, he is just a common laborer". In like manner, a witness was asked if she knew that when the Boices left, Mrs. Boice was pregnant. No one testified to such a pregnancy. I cannot

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[6]But as to whether, at such a late hour in the trial the effect of the questions could be removed by an admonition, see United States v. Grayson, (2 cir.) 166 F. 2d 863, 871, Waldron v. Waldron, 156 U. S. 360, 383.

[7]In a lengthy effort to justify his procedure, appellee cites decisions to the effect that the purpose of cross-examination is to show bias, to show previous contradictory statements, to place the witness in his proper setting, to modify or explain the testimony, etc. It is claimed that the cross-examination here was to show these things. The fallacy of that argument here is that none of those things were shown. They were only insinuated.

escape the conclusion that this question, and the conversation about "just a common laborer", and the question about a company official rejecting a proposed employee because she was Jewish, were all dragged in merely for their likelihood to cite passion and prejudice.

A jury cannot be expected to make a calm, judicious and fair appraisal of damages in such an atmosphere. It is apparent that this one did not. Where an excessive verdict thus results from passion and prejudice, the error cannot be cured by remittitur. A new trial must be granted, for the means employed at the trial "may be quite as effective to beget a wholly wrong verdict as to produce an excessive one." Minneapolis etc. Ry. v. Moquin, 283 U. S. 520.[8]

In my opinion a very thin case has here been whipped into a monstrosity. I think a new trial should be ordered.

(Endorsed:) Opinion and Dissenting Opinion. Filed Dec. 5, 1951, Paul P. O'Brien, Clerk.

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[8]I think, also, there is a nice question whether the trial judge did not erroneously refuse to exercise his discretion to grant a new trial, because he mistook his power to do so in a case where the verdict is against the weight of the evidence. In his opinion denying a new trial, after referring to the Constitutional right of trial by jury, he said: "If this mandate is to be obeyed the Court must proceed with caution when a motion such as is now before this court is considered, with the thought in mind that if the Court is going to set aside the verdict for no reason except that the court feels it is excessive, this constitutional provision will be violated and a jury trial would be a useless thing if in the final outcome the Court could supplant its opinion in place of the opinion of the jury." This sounds like the statement of the trial court which led to reversal in Felton v. Spiro, (6 cir.) 76 F. 576, which was cited with approval in Fairmount Glass Works v. Coal Co., 287 U. S. 474, 481. The Constitutional right to trial by jury, mentioned by the trial judge, includes the right to a trial under the direction of a judge empowered to grant a new trial when he believes the verdict is against the weight of the evidence. Capital Traction Co. v. Hof, 174 U. S. 1, 13. This is "one of the historic safeguards of that right." Aetna Casualty & Surety Co. v. Yeatts, (4 cir.) 122 F. 2d 350, 352. Cf. Southern Pac. Co. v. Guthrie, (9 cir.) 186 F. 2d 926, 932.

Appendix B

United States Court of Appeals for the Ninth Circuit

BRADLEY MINING CO., a corporation, *Appellant,* vs. EDWARD H. BOICE, *Appellee.*	No. 12,684 Aug. 27, 1952

BEFORE: HEALY, BONE, and POPE, Circuit Judges

PER CURIAM

In this case we affirmed a judgment against the appellant, one member of the court dissenting. 194 F. 2d 80. Appellant petitioned for a rehearing in banc, and rehearing was denied. Application for certiorari followed and was denied. 343 U.S. 941. Upon the coming down of the mandate appellant moved for leave to file a motion to vacate the denial of its petition for rehearing in banc and for the reinstatement of its petition. That motion is the matter before us for disposal.

The case was not in any aspect of such character as to suggest the advisability of its being heard or reheard in banc. It involved purely factual issues. Depending upon how the jury might evaluate the evidence, or how appraise the credibility of the witnesses, it was concededly a case in which both actual and exemplary damages were awardable. The charges made against the defendant, and presumably accepted by the jury as true on the evidence before it, were for conduct of a nature calculated to blast at the threshold

the efforts of a young doctor to establish himself in his profession. The problem presented bore scant resemblance to Southern Pacific Co. v. Guthrie, 186 F. 2d 926, and speculation as to the probable attitude here of the judges who participated in *Guthrie* has no perceivable basis.

The judge who presided at the trial, convinced that the jury was not motivated by passion or prejudice and that its verdict, while large, was not excessive, denied a motion for a new trial.* Being ourselves disinclined to usurp the functions of the jury or to invade the province of the district judge, and being, moreover, of opinion that the judge was right in refusing to disturb the verdict, we affirmed. Appellant has had its appeal and its opportunity for certiorari or other relief in the Supreme Court. It is not entitled to pursue the process a second time.

The motion for leave to file is denied.

POPE, Circuit Judge, dissenting.

I think that a just disposition of this case requires that the appellant be granted an opportunity to reargue the case before the court sitting in bank.

In a recent opinion of this court in bank in Western Pacific Railroad Corporation, et al., appellants, v. Western Pacific Railroad Company, et al., appellees, No. 12506, handed down July 9, 1952, the court, after denying the right of a defeated litigant to require all of the judges of the court to consider a petition for rehearing of a case originally heard by a division of the court, pointed out that it recognized that certain cases are appropriate ones for consideration by a court in bank. The opinion enumerated cer-

*92 F. Supp. 750.

tain types of cases which have frequently been treated in this manner.†

In my opinion the circumstances make this particular case, in the light of the views expressed by all the members of the court with respect to some of the problems here involved, one in which a hearing in bank should be granted. I think that we, as members of this division which heard the case originally, should recommend a hearing in bank and by our action invite all the judges to participate.

My views in this respect are not based upon the mere fact that I have disagreed with the result reached in the majority opinion here, nor upon my feeling that a grave miscarriage of justice has been given the stamp of approval by this court. Rather my views are based upon the demonstrable probability that were this case heard by all seven

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†I have a somewhat different view of the purport of the opinion in the Western Pacific Railroad Corporation case mentioned above than that which Judge Denman expressed in his dissent in that case. As I understand the majority opinion, it went no further than to hold that a disappointed litigant in the position of the appellant in that case could not, by filing a petition for rehearing in bank, require all the judges of the court to consider and pass upon that petition. I concurred in that opinion because in my mind a contrary holding would mean that the court would, as a practical matter, lose the opportunity which it now has to expedite its disposition of cases through the hearing of matters before divisions. For instance, in the present case the record fills four printed volumes comprising nearly 2000 pages and I know what a task it was to read that whole record. I do not think the statute intended that I, not a member of the division which heard the Western Pacific case, should have to read all the record in that case, as I might well find necessary in order to vote intelligently upon the petition.

There is language in subdivision (c) of § 46 of Title 28 which would seem to grant to a majority of the circuit judges of the circuit the right to order a hearing or rehearing in bank in any case, a procedure which I am of course not proposing here. That is a question which was not determined by the majority opinion in the Western Pacific case, although Judge Denman seems to think that it was. Upon that question I reserve judgment until such time as determination becomes necessary.

judges a different result would be achieved. A study of the views expressed by all seven of the judges in Southern Pacific Company v. Guthrie, 186 F. 2d 926, (1951), will disclose why I think it evident that a hearing in bank would produce a different result.

As I have pointed out in my previous dissent in this case, the verdict upon which judgment has been entered here has the vice not merely of being excessive in amount but its validity is tainted by the errors in injecting into the case matters highly prejudicial and calculated to arouse the passion and prejudice of the jury. It is a stronger case than was Guthrie.

The point that I am making is that in any case where the division hearing the matter can say that there is a fair probability that all seven of the judges would arrive at a different conclusion than that expressed by a mere majority of a division, the case is an appropriate one for a hearing in bank. It is unthinkable to me that a division of the court may lay down a rule or enter a judgment knowing that a majority of the judges who constitute this court would probably disagree. That is this case and for that reason I think that a rehearing should be granted.

(Endorsed:) Per Curiam Opinion and Dissenting Opinion of Pope, C. J. Filed Aug. 27, 1952. Paul P. O'Brien, Clerk.

Appendix C

United States Court of Appeals
for the Ninth Circuit

BRADLEY MINING COMPANY, a Corporation, *Appellant,* vs. EDWARD H. BOICE, *Appellee.*	No. 12,684 Jun. 24, 1953

Appeal from the United States District Court, for the District of Idaho, Southern Division

BEFORE: HEALY, BONE and POPE, Circuit Judges

PER CURIAM

Upon the original calendaring of this case it was duly assigned for hearing and decision to a division of the court consisting of Circuit Judges Healy, Bone and Pope. For that purpose, the division constituted the court. After hearing the judgment of the district court was affirmed. 194 F 2d 80. Subsequently, on January 18, 1952, appellant filed a petition entitled "Petition for a rehearing en banc." On January 23, 1952, the division made and entered an order denying the petition.

Thereafter appellant petitioned for certiorari and by order entered May 5, 1952, 343 U. S. 941, the Supreme Court denied certiorari. Upon the coming down of the mandate appellant moved for leave to file a motion to vacate the denial of its petition for rehearing en banc and for the reinstatement of its petition. On August 27, 1952, the division denied the motion for leave to file, one judge dissenting. 198 F. 2d 790.

On April 13, 1953, the Supreme Court vacated its denial of certiorari, granted the writ, vacated the order of the division of this court denying the petition for rehearing en banc, and remanded the cause for further proceedings in light of Western Pacific Railroad Corp. v. Western Railroad Co., 345 U. S. 247, decided April 6, 1953, 345 U. S. 932.

Thereafter on May 27, 1953, this court's Rule 23 (formerly Rule 25) was amended by adding thereto two new paragraphs reading as follows:

> "All petitions for rehearing shall be addressed to and be determined by the court as constituted in the original hearing.
>
> "Should a majority of the court as so constituted grant a rehearing and either from a suggestion of a party or upon its own motion be of the opinion that the case should be reheard en banc, they shall so inform the Chief Judge. The Chief Judge shall thereupon convene the active judges of the court and the court shall thereupon determine whether the case shall be reheard en banc."

Pursuant to the decision of the Supreme Court of April 13, 1953, and this court's Rule 23, as amended, appellant's petition for rehearing en banc has been considered by this court as constituted in the original hearing, and this court as so constituted being of the opinion that the case should not be reheard en banc or otherwise, it is now ordered by this court as so constituted that the petition be and is hereby denied.

POPE, Circuit Judge, dissenting.

I have twice stated my reasons for dissent in this case, (194 F. 2d at p. 84; 198 F. 2d at p. 791). Why I disapprove the performance which passed for a trial in the court below

have been fully explained. Much as I deplore what has happened here, it is assuredly not on my conscience.

The majority of this division have undertaken to justify their affirmance of the judgment, and denial of a rehearing, either en banc or otherwise, on the ground that the case "involved purely factual issues". (198 F. 2d at p. 791). In my opinion, that is simply not true. The question is whether a litigant in a federal court is entitled to have the judges, both trial and appellate, exercise their constitutional power, and perform their duty, to pass judgment.

Although this is a case which got in the federal court by reason of diversity of citizenship, in my view it poses an important federal question relating to the function of a trial judge. In denying a motion for new trial on the ground of the excessiveness of the verdict, the trial court said, (92 F. Supp. at p. 755): "At the very threshold of this inquiry it must be remembered that the Constitution of the United States, Amendment 7, and of this State, art. 1, § 7, as well as all other States, has secured the right of trial by jury in civil actions by the words, 'shall be preserved', or, as stated in the Constitution of the State of Idaho, 'shall remain inviolate'. If this mandate is to be obeyed the Court must proceed with caution when a motion such as is now before this Court is considered, with the thought in mind that if the Court is going to set aside the verdict for no reason except that the Court feels it is excessive, this constitutional provision will be violated and a jury trial would be a useless thing if in the final outcome the Court could supplant its opinion in place of the opinion of the jury."

Most assuredly this is not the law. Murphy v. United States District Court, 9 cir., 145 F. 2d 1018, 1020; Charles v.

Norfolk & Western Ry. Co., 7 cir., 188 F. 2d 691, 695; Felton v. Spiro, 6 cir., 78 F. 576, 581. And the trial court, proceeding upon this mistaken premise, after discussing the size of the verdict, concluded that "the amount of damages allowed was the jury's best judgment," (92 F. Supp. at p. 756).

That the appellant was entitled to more than that, and that such mistaken renunciation of power by the trial judge is reversible error, was decided in Felton v. Spiro, supra, by a court of which Judges Taft and Lurton were members, in which it was said: "But the motion for new trial is a remedy accorded to a party litigant for the correction by the trial court of injustice done by the verdict of a jury. It is one of the most important rights which a party to a jury trial has. It is a right to invoke the discretion of the court to decide whether the injustice of the verdict is such that he ought to have an opportunity to take the case before another jury. If, now, in exercising this discretion, it is the duty of the court to consider whether the verdict was against the great weight of the evidence, and he refuses to consider the evidence in this light on the ground that he has no power or discretion to do so, it is clear to us that he is depriving the party making the motion of a substantial right, and that this may be corrected by writ of error." (78 F. 581.)

For this reason alone the case should have been reversed and remanded.

In Southern Pac. Co. v. Guthrie, 9 cir., 186 F. 2d 926, all the judges of this court, with one exception, reaffirmed the rule of this circuit, that an appellate court has the power to do something about a monstrous verdict. Appellant had a right to have his case submitted to judges who follow that

rule. I have previously stated why I think a study of the various opinions in that case will demonstrate that a hearing of this case en banc would produce a different result. In those circumstances, I say again, it is our duty to afford appellant that opportunity.

In a memorandum recently prepared by a committee of circuit judges for presentation to Congress, the following statement is found: "It need hardly be emphasized that the services performed by the judges of the federal courts is second to none in this country in its importance to the Nation. As Chief Justice Marshall said, 'The judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all.' In the words of the late Mr. Justice Sutherland, 'If the political structure erected by the fathers rests upon any one pillar more securely than upon another, it is upon that which upholds the right of the individual to invoke the judgment of the civil courts of the land upon his conduct.'"

I think that no one will question what is there stated. But to the appellant in this case, this must sound pretty hollow. For as I see it, both the trial judge and the judges of this court, have simply refused to function.

(Endorsed:) Per Curiam Opinion and Dissenting Opinion. Filed Jun. 24, 1953. Paul P. O'Brien, Clerk.

Appendix D

EXAMPLES OF INFLAMMATORY CROSS-EXAMINATION BY COUNSEL UNDER GUISE OF IMPEACHMENT

The numerous examples of inflammatory "impeachment" cross-examination, not followed up by counsel have been referred to in part in our brief, supra. For convenience in checking the record, these examples are set forth in this Appendix with citations to pages in the transcript.

(1) The interjection of religious prejudice into the cross-examination of Mr. Bailey, the mine manager, (as to a nurse applicant being turned down because she was a Jewish refugee) is mentioned in our brief—a full record statement of this follows—this took place during the cross-examination by appellee's counsel of Mr. H. D. Bailey relating to a conversation between Mr. Bailey and the Doctor regarding the hiring of Miss Morton, the head nurse (1602, 1603):

"Q. What did you do at the office after you got there with Dr. Boice?

A. The Doctor asked my opinion of the three nurses, and I told him that it was his affair, that he had to work with them, that it wasn't my affair at all.

Q. Did you go over the applications?

A. I didn't see the applications—he talked with them informally; there were no formal applications.

Q. Did he discuss their qualifications with you?

A. No, I don't think so.

Q. Do you recall Miss Hirst that was brought in?

A. I think she was one—she may have been there.

Q. She was a **Jewish refugee,** was she not?

A. I don't know.

Q. You remember the Doctor told you that in addition to her training that she had three years of medical training?

A. No, I don't remember that.

Q. And that she would be a valuable asset, would be a help to them?

A. As I recall the Doctor said Miss Morton had the better qualifications.

Q. Isn't it a fact that you said Miss Hirst would not fit into the picture at Stibnite, and 'You better forget her'?

A. No, sir.

Q. You don't recall saying that—saying that inasmuch as she was **Jewish**, and a **Jewish refugee**, that she would not fit into the life at Stibnite and that you may as well forget her?

A. Nothing was said about being Jewish."

Counsel put on no witnesses to testify to the above comment and Respondent himself did not take the stand on rebuttal.

Many other instances of similar cross-examination occur in the record—some amounting to testimony by counsel under the guise of impeachment, and others of unquestionable impeaching character—all without foundation in the record, with no attempt at substantiation by counsel. It is obvious, therefore, the counsel intended throughout cross-examination to influence the jury by reckless and groundless inflammatory cross-examination—substituting in effect counsel's own testimony for respondent's case.

(2) See the cross-examination of Mr. Zarybnisky (1418-1419):

"Q. Do you know Mr. and Mrs. Cliff Ross?

A. Yes, sir.

Q. Were they at your home on Saturday?

A. I don't remember.

Q. Were they at your home on Sunday?

A. They were at our home.

Q. Do you remember—on Sunday going into their home and in the presence of Mr. and Mrs. Cliff Ross and your wife, stating that you had just been told that 'Doc had gone crazy'?

A. I don't remember.

Mr. Breshears: We object to this, there is no connec- with management or any of the defendants here.

"Mr. Hawley: *It is for the purpose of impeachment.*

The Court: *You may ask for that purpose.*

Q. *Do you remember on that occasion that you said Doc had gone crazy, and that you had instructions to keep him under guards, and that you had instructions to shoot him down like a dog if he got funny?*

A. No, sir, I don't."

This it will be noted is an instance where the right of counsel for respondent to ask the question was challenged by objection, and counsel made the specific promise to the court that he would follow through with the necessary proof.

Neither Mr. nor Mrs. Ross, nor any other witnesses who were put on the stand, substantiated counsel's "purpose of impeachment" as promised the court. Counsel's purpose was obviously without foundation, to get over the effect of the *question* to the jury.

(3) Mr. Martin, the Valley County prosecuting attorney, was asked "Did you state it was silly for them to try to fight Mr. Bradley and his money?" (1326);

(4) Mrs. Keele, the Boices' housekeeper, was asked "Did you at a time in May of 1948, know that Mrs. Boice was *pregnant?*" (760).

Neither respondent nor Mrs. Boice, nor anyone else, testified as to any such pregnancy—nor is there anything whatever in the record to indicate that the officials of the company were told, suspected, or knew of any such condition, if in fact it existed. This is another highly inflammatory instance of counsel's blueprint for prejudicing the jury.

Attention should be called here to the uncontradicted and unimpeached testimony of four graduate registered nurses and several practical nurses—and to the "impeaching" tactics of counsel. As to this see Judge Pope's comment (App. A, p. 9 ff):

> "But, with respect to the amount of damages, the Mining Company had the right, under the Idaho statute, to show the matters testified to by the nurses by way of mitigation. What impresses me is that the testimony of these four graduate registered nurses was not impeached in any manner. They were wholly disinterested when they testified, none of them is shown to have had any motive to misrepresent, and what is more, their testimony was not even denied. Under these circumstances, I think the court was obliged to assume that their testimony was true and, if it was true, there was assuredly something gravely wrong about the conduct of the appellee doctor in and about the performance of his duties. . . . Appellee's counsel no doubt felt that they should in some manner undertake to break down the effect of the testimony of the nurses to which I have referred. They proceeded to do this by propounding to each of them certain questions, which, if answered in the affirmative, would have disclosed that the nurse in question was very biased against the doctor, or had made prior statements contradictory of her present testimony. . . . But no such testimony was adduced.

The record here, however, shows a pattern of similar inquiries so repetitive, and so completely unsupported by any attempt to establish the suggested impeachment otherwise than by the mere asking of the questions, that the only fair conclusion, I think, is that they show a deliberate effort to inject, not by proof, but merely by innuendo, matters calculated to give rise to passion and prejudice on the part of the jury."

(5) Counsel's "impeaching" tactics reached a reckless peak in order to discredit Miss Morton—obviously due to the fact that she, as head nurse with 17 years of wide experience, divulged to management facts which led the company to act immediately to complete the April 30th termination of respondent's employment. In addition to the examples given above, see the following "discredit by question" without any foundation (1025):

"Q. Miss Morton, immediately after your arrival on the 29th of April, or the next day, or within a day or two, you started to criticize Dr. Boice to the other nurses did you not?

A. No, sir.

(6) Q. Were you not also talking to the patients and criticizing the doctor's treatment of the patients?

A. No, I used all the excuses I could manage to cover up for Dr. Boice not seeing his patients." (1025)

Further steps were taken to introduce a "company spy" theory with regard to nurses to prejudice the jury—(7) "Did you tell Helen Christensen that you were not employed by Dr. Boice but were employed by Mr. Bailey?" (Miss Morton 1022);

(8) "When the doctor asked you to leave, didn't you tell him at that time that you were not working for him and that he could not fire you, that you were working for Mr. Bailey?" (Miss Morton 1113, 1114);

(9) "Is it not a fact that Miss Jeanne Morton stated to you during the period of your employment at Stibnite, that she was hired as head nurse by B. F. Mahoney and H. D. Bailey for the purpose of constantly checking on Dr. Boice and reporting back to them?" (Mrs. Anaruk 1152).

(10) Mr. Mahoney, the personnel manager, was asked "As a matter of fact at times when nurses were employed there and got their slips from you, you told them to watch what was going on and report to you?" (487)

(11) "Were you ever present, during your period at the Stibnite Hospital, when Miss Jeanne Morton made statements to Mr. Provost criticizing Dr. Boice when Dr. Boice was not present?" (Mrs. Anaruk 1149)

(12) "Do you know whether or not Miss Morton, during that entire period, was extremely critical of Dr. Boice to you and the practical nurses and also the patients involved?" (Mrs. Richardson 1228)

To inflame the jury against the nurse witnesses—see

(13) "Didn't you tell Mr. Provost that he should sue the doctor for malpractice?" (Miss Morton 1025);

(14) "Had you, prior to May the 14th, 1948, known that there was a great deal of friction between Miss Morton, Dr. Boice and some of the nurses in the hospital?" (Mr. Mahoney 514);

(15) "Was it in the doctor's orders that he (Mr. Sims) was to receive this sedative for relief * * * didn't you refuse to give it to him?" (Miss Kirshner 833, 834);

(16) "Isn't it a fact that you told her (Mrs. Baker—a patient) in the presence of Helen Christensen, one of the nurses up there, that she should get out of the hospital, that there was nothing wrong with her?" (Miss Kirshner 852);

(17) "Shortly after Miss Kirshner arrived at the hospital, do you recall telling Helen Christensen that she was in disgrace in the nursing profession?" (Mrs. Johnson 963);

(18) "Is it not a fact that Mrs. Bishop (the surgery patient in May, where plaintiff did not change his torn glove) had knowledge that Bradley Mining Company desired to terminate Dr. Boice's services, and that she insisted that Dr. Boice perform the operation prior to his leaving Stibnite?" (Mrs. Anaruk 1149);

(19) "Is it not a fact, that after the employment of Dr. Boice was terminated by the Bradley Mining Company you stated to Faye Anderson, within a few days thereafter, that you had never seen anything like the treatment accorded Dr. Boice by the Bradley Mining Company or their agents?" (Mrs. Anaruk 1146);

(20) "Is it not a fact that you told Faye Anderson, in the presence of other practical nurses, within a few days after Dr. Boice's termination at the Stibnite hospital, that you were going to quit your employment with the Bradley Mining Company because you did not like the way they treated Dr. Boice and that you wanted no part of a hospital setup where such a thing could happen?" (Mrs. Anaruk 1146).

(21) Nurse Lee was asked if she, about that time, did not go to Dr. Boice to express her sympathy, and did not then say "he was the best surgeon [she] had ever known." (1189)

Counsel put on no witnesses and no evidence to support or to follow through on the above questions which were denied. The plaintiff himself did not take the stand on rebuttal, nor did his three nurse witnesses, Faye Anderson Nock, Helen Christensen, or Zina Gubser give one word of testimony to substantiate this "impeachment" cross-examination.

(22) To inflame the jury against the defendant company regarding the placing of guards in the hospital to keep plaintiff from the patients, defendant John Bradley was asked with regard to Mrs. Wood, from whom the fetus had been taken,—"As a matter of fact, as a result of delay in care and being without attention, this patient had a slight infection set in in her wound?" (Mr. Bradley 1837).

Counsel called Mrs. Wood and her husband in rebuttal but did not even attempt to fill in the suggested impeachment.

(23) Counsel went to great lengths to get before the jury a purported conversation between officials of the defendant company in which someone allegedly asked the question "Do you think his word would stand up?", with the answer "No, he is just a common laborer" (319, 345, 1676, 1824, 1943).

There was no showing whatever that this purported conversation—allegedly "overheard" by a witness in another room—had any relation to this case.

The same pattern of suggested and innuendo by cross-examination under the guise of impeachment occurs in at least 30 additional places in the record—there are in all over 52 such examples. See:

Defendant Bradley 1777, 1778, 1779, 1827, 1841; Mahoney —personnel manager—498, 499, 500, 501; Bailey—mine manager—1614, 1615-1619, 1625, 1639, 1640, 1677; Mrs. Keele—plaintiff's housekeeper—758, 759; Nurse Kirshner 852, 853, 854, 855; Nurse Johnson 960, 961, 965; Nurse Morton 1045, 1045-1055, 1077; Nurse Anaruk 1145, 1146, 1147; Nurse Lee 1188, 1189; Mossman—County Sheriff—1261, 1262; Logue—deputy Sheriff—1477, 1494; Dr. Lowe—a psychiatrist flown in by the Company—1962, 1963.

These matters wrongfully injected into the record were so inflammatory and prejudicial that the effect thereof could not have been removed by motions to strike or instructions to disregard. It was not possible to object to the questions asked ostensibly for purposes of impeachment.

If the appellant at the close of the case had moved that these matters be stricken, and the court had stricken each and every one and instructed the jury to disregard the same, such action would have served but to emphasize them.*

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*"Indeed as experienced trial lawyers have often observed, merely to raise an objection to such testimony—and more to have the judge tell the jury to ignore it, *often serves but to rub it in.* Judge Frank in *U. S. v. Grayson* (C.C.A. 2) (1948) 166 F.2d 863, at 871.

"It certainly cannot be said that such testimony would not unconsciously affect the verdict however much the jury might be disposed to follow the instructions of the court." (*Lockhart v. U. S.* (C.C.A. 9) (1929) 35 F.2d 905)

Inflammatory matter injected into a record may be so prejudicial that its sting cannot be removed by admonition or instruction. See *Waldron v. Waldron,* 156 U.S. 360, 383.

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In the Supreme Court of the United States

OCTOBER TERM 1953

No. 321

BRADLEY MINING CO., A Corporation,
Petitioner,

vs.

EDWARD H. BOICE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM 1953

No. 321

BRADLEY MINING CO., A Corporation,
Petitioner,

vs.

EDWARD H. BOICE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court denying the motion for a new trial (R. 116 ff.) is reported in 92 F. Supp. 750, (1950). The opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the District Court (R. 2204 ff.) is reported in 194 F. (2d) 80 (1952). The Petition for rehearing and rehearing en banc was denied by the United States Court of Appeals for the Ninth Circuit (R. 2226 ff.). The

opinion of the United States Court of Appeals for the Ninth Circuit denying Petitioner's application to vacate the denial of its Petition for rehearing and to reinstate the Petition (R. 2300 ff.) is reported in 198 F. (2d) 790. Petitioner's initial Petition to the United States Supreme Court for Writ of Certiorari was denied, 243 U.S. 941, (1952). On rehearing the order denying certiorari was vacated and the Petition for Writ of Certiorari was granted, 245 U.S. 932. Pursuant to the mandate of the United States Supreme Court vacating the order of the Court of Appeals denying Appellant's Petition for rehearing en banc, the petition for rehearing en banc was again considered by the United States Court of Appeals for the Ninth Circuit and was denied (R. 2328 ff.); the opinions are not yet reported.

JURISDICTION

On rehearing the United States Supreme Court granted Petitioner's Petition for Writ of Certiorari, and thereupon issued its mandate remanding the case to the United States Court of Appeals for the Ninth Circuit for further proceedings in the light of the opinion of the U. S. Supreme Court in Western Pacific Railroad Corporation v. Western Pacific Railroad Company, No. 150 and 160, October Term, 1952, 345 U.S. 247. Pursuant to the mandate of the Supreme Court the United States Court of Appeals for the Ninth Circuit considered Appellant's Petition for rehearing en banc and thereupon denied the same (R. 2328 ff.).

A second petition for Write of Certiorari in this case was filed by Petitioner, and the jurisdiction of this court is envoked under Title 28 U.S.C.A. Sections 1254 (1) and 2101 (c).

QUESTIONS PRESENTED

In its petition for writ of certiorari petitioner attempts to raise three questions for consideration by this court. Of these questions, only the third could possibly be before this court on this petition:

1. Whether the trial court correctly conceived its function and performed its duty in denying petitioner's motion for a new trial, which action by the trial court was approved by the court of appeals. (Petitioner's question No. 1, Petition for Writ of Certiorari, Page 4).

2. Whether the jury was motivated by passion or prejudice, and that thereby an excessive verdict resulted, contrary to the determination of the trial judge and the court of appeals. (Petitioner's questions Nos. 2, 3, 4, and 5, Petition for Writ of Certiorari, Page 4).

3. Whether the United States Court of Appeals for the Ninth Circuit properly complied with the mandate of this court issued pursuant to its decision on the first Writ of Certiorari. (Questions Nos. 6 and 7, Petition for Writ of Certiorari, Page 5.)

STATEMENT OF THE CASE

Petitioner's first petition to this court for a writ of certiorari was denied, 343 U.S. 941. On rehearing this

court vacated its order denying certiorari and granted the petition for writ of certiorari. Thereafter, upon consideration of Appellant's petition this court remanded the cause to the United States Court of Appeals for the Ninth Circuit and vacated that court's order denying the petition for rehearing en banc. The Court of Appeals was directed by the mandate to entertain further proceedings with respect to Appellant's petition for rehearing en banc, in the light of the opinion of this court in Western Pacific Railroad Corporation v. Western Pacific Railroad Company, No. 150 and 160, October term, 1953, decided April 6, 1953, 345 U.S. 247.

Pursuant to the instructions of this court as set forth in the Western Pacific case, the Court of Appeals promulgated Amended Rule 23, providing that petitions for rehearing en banc should be determined by the panel of the court as constituted in the original hearing.

Acting under the authority of Rule 23 the Court of Appeals, by the original panel, reconsidered the petition of Appellant for rehearing en banc and denied the same. (R. 2328ff.)

The statement of the facts out of which this litigation arose is set forth in Respondent's brief in opposition to the first Appellant's petition for writ of certiorari, case No. 648. It is unnecessary to repeat this statement here for the purpose of considering this second petition for writ of certiorari, inasmuch as the questions there raised are not before this court on Appellant's second petition for certiorari.

REASONS FOR DENYING THE WRIT

(A) THIS PROCEEDING IS LIMITED TO MATTERS SUBSEQUENT TO THE ISSUANCE OF THE MANDATE.

The first five questions which petitioner attempts to present to this court in this its second petition for writ of certiorari, as set forth therein on page 4, assert purported errors in the trial of this case in the District Court. The trial of this "aged litigation"[1] was conducted more than four years ago. These exact questions have on four separate occasions been considered by the Court of Appeals for the Ninth Circuit, on the original appeal, on
the petition for rehearing en banc, on the motion to vacate the denial of the petition for rehearing, and on the second consideration of the petition for rehearing en banc pursuant to the mandate of this court.

These exact questions were presented to this court on petitioner's first petition for writ of certiorari, which petition was originally denied. On rehearing this court vacated the denial and granted the petition for writ of certiorari. At that point this court then had before it the petition for writ of certiorari in toto, and all the questions and issues set forth in the petition were then before the court for its consideration. This court thereupon vacated the order of the Court of Ap-

[1] Dissenting opinion of Justice Jackson in Western Pacific Railroad Corporation v. Western Pacific Railroad Company, 345 U.S. 247.

peals denying the petition for rehearing en banc and remanded the case for further proceedings in the light of the opinion in the Western Pacific case. The mandate was limited to that sole question, and therefore if the Court of Appeals complied with the mandate it is the settled law of this court that other issues before the court in the original proceedings will not again be considered. These alleged errors of the trial court will not a second time be reviewed by this court. All that this court will concern itself with are proceedings subsequent to the mandate, to determine if the Court of Appeals properly complied therewith.

In Corning v. The Troy Iron and Nail Factory, 56 U. S. 451, 14 L. Ed. 768, (1853), this court said:

> "It is plain, therefore, that under the guise of an appeal from the decree of the Circuit Court, this is an appeal, in fact, from the decision of this court. For there is no other decree existing in the case except the decree of this court. There must be an end of litigation sometime. To allow a second appeal to the court of last resort, on the same questions which were open to dispute on the first, would lead to endless litigation.
>
> "A second appeal lies only when the court below, in carrying out the mandate of this court, is alleged to have committed an error. But on an appeal from the mandate, it is well settled, that nothing is before the court but the proceedings subsequent to the mandate. Whatever was for-

merly before the court, and was disposed of by its decree, is considered as finally disposed of."

This principle was again affirmed in Stewart v. Salamon, 7 Otto 361, 24 L. Ed. 1044, (1878), wherein it was stated:

"An appeal will not be entertained by this court from a decree entered in the circuit or other inferior court, in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is, in effect, our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will upon the application of the appellee, examine the decree entered, and if it conforms to the mandate, dismiss the case with costs. If it does not, the case will be remanded with appropriate directions for the correction of the error. This is not intended to interfere with any remedy the parties may have by mandamus.

"This is an appeal from a decree entered upon our mandate. No complaint is made as to its form, and it seems to be in all respects according to our directions. The effort of the appellant was to open the case below, and to obtain leave to file new pleadings, introducing new defenses. This he could not do. The rights of the parties in the subject-matter of the suit were finally determined upon the original appeal, and all that remained for the circuit court to do was to enter a decree in accordance with

> our instructions, and carry it into effect. If in the progress of the execution of the decree, after its entry, either party is aggrieved, he may appeal from the final decree in that behalf; but such an appeal will bring up for re-examination only the proceedings subsequent to the mandate."

This court ruled in Texas & P. R. Co. v. Anderson, 149 U.S. 237, 37 L. Ed. 717, (1893) that where a point could have been raised by appellant in the Supreme Court and was not, the decree of the trial court issued in accordance with the mandate was final and a second appeal could not raise such an issue. In the case at bar all questions were raised, and were before this court for its determination.

The reasons for this rule are clearly expounded in Roberts v. Cooper, 20 How. 467, 15 L. Ed. 969, (1857), wherein this court stated:

> "On the last trial, the Circuit Court was requested to give instructions to the jury, contrary to the principles established by this court on the first trial, and nearly all the exceptions now urged against the charge are founded on such refusal. But we cannot be compelled on a second writ of error in the same case to review our own decision on the first. It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out it brings

up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members."

This rule early established by this court has been consistently followed without deviation.

Cook v. Burnley's Exrs., 11 Wall. 672, 20 L. Ed. 84, (1870)

Illinois ex rel. Hunt v. Illinois C. R. Co., 184 U. S. 77, 46 L. Ed. 440, (1901)

United States v. New York Indians, 173 U. S. 464, 43 L. Ed. 769, (1898)

Aspen Mining & Smelting Co., v. Billings, 150 U. S. 31, 37 L. Ed. 986, (1893)

Kingsbury v. Buckner, 134 U. S. 650, 33 L. Ed. 1047, (1889)

Mackall v. Richards, 116 U. S. 45, 29 L. Ed. 558, (1885)

Humphrey v. Baker, 103 U. S. 736, 26 L. Ed. 456, (1881)

Board of Supervision v. Kennicott, 4 Otto 498, 24 L. Ed. 260, (1877)

Magwire v. Tyler, 17 Wall. 253, 21 L. Ed. 576, (1872)

United States v. Camou, 184 U. S. 572, 46 L. Ed. 694, (1902)

Pearce v. Germania Ins. Co., 6 Otto, 461, 24 L. Ed. 672, (1878)

Therefore any alleged errors in the trial of this case have not only been repeatedly passed upon and disallowed by the Court of Appeals but were squarely before this court when the original petition for writ of certiorari was granted. This court then had for its determination all of these issues. The only mandate which this court issued was the instruction to the Court of Appeals to reconsider the petition for rehearing en banc. Under the long established doctrine of this court as propounded in the foregoing cases a second petition for writ of certiorari will not again resurrect these long buried issues.

(B) THE COURT OF APPEALS HAS FULLY COMPLIED WITH THE MANDATE OF THIS COURT.

This court, on April 13, 1953, entered the following order:

> "PER CURIAM: The petition for rehearing is granted. The order entered May 5, 1952, denying

certiorari is vacated and the petition for writ of certiorari is granted. The order of the division of the Court of Appeals denying petition for rehearing en banc is vacated and the case is remanded to the Court of Appeals for further proceedings in the light of Western Pacific Railroad Corporation v. Western Pacific Railroad Company, Nos. 150 and 160, decided April 6, 1953."

Thereafter, pursuant to the mandate of this court and Rule 23, as amended, of the Court of Appeals covering en banc rehearings, providing that such petitions for rehearing shall be addressed to and determined by the court as constituted in the original hearing, the Appellant's petition for rehearing en banc was directed to the division of the court as constituted on the original appeal. In its per curiam opinion filed June 24, 1953, the Court of Appeals stated:

"Pursuant to the decision of the Supreme Court of April 13, 1953, and this court's Rule 23, as amended, appellant's petition for rehearing *en banc has been considered by this court* as constituted in the original hearing, and this court as so constituted being of the opinion that the case *should not be heard en banc or otherwise*, it is now ordered by this court as so constituted that the petition be and is hereby denied."
(Emphasis ours)

This court in Western Pacific Railroad Corporation v. Western Pacific Railroad Company, supra, made it crystal clear that the Courts of Appeal could delegate to the division of the court which initially heard the appeal, the determination of petitions for en banc rehearing. We note from the opinion of the Chief Justice, in support of our statement, these excerpts from the opinion:

> "A majority may choose to abide by the decision of the division by entrusting the initiation of a hearing or rehearing en banc to the three judges who are selected to hear the case.
>
> * * *
>
> "Consistent with the statute, the court may, as has been shown, adopt a practice whereby the majority of the full bench may determine whether there will be hearings or rehearings en banc, *or they may delegate the responsibility for the initiation of the en banc power to the divisions of the court.*
>
> * * *
>
> "If in the exercise of its discretion under Section 46 (c), a court denies litigants the privilege of reaching the ear of every Circuit judge on the en banc question, it is still no reason to deny them access to the few Circuit judges, who must act initially, and perhaps decisively on the matter for the others.

> "If the court chooses to abide by a procedure which entrusts the initiation of rehearings en banc to the division, then the court should give an opportunity to the division for appropriate consideration of that question in this case."

Again in the opinion of the court it is apparent beyond any question that the establishment of procedures in connection with petitions for rehearing en banc is purely an administrative function within the Court of Appeals. Each Circuit was given the right to establish its own procedure, within the limitations of the case; litigants were given "no statutory rights to compel each member of the court to give formal consideration to an application for a rehearing en banc," and Section 46 (c) did "not compel the court to adopt any particular procedure governing the exercise of the power; * * *."

Contrary to Appellant's views, stressed so strongly in its petition for rehearing of the order denying its initial petition for a writ of certiorari, that the practice of the Ninth Circuit permitting a mere division of the judges to determine petitions for rehearing en banc was in direct violation of Section 46 (c), Appellant now leans over to the other side of the fence and states, "appropriately, the exercise of the power might be delegated to a division of three judges." Upon the granting of Appellant's first petition for writ of certiorari, without limitation, all issues asserted by appellant therein

were presented to this court. Thereupon this court's mandate issued and the sole directive set forth therein was for further proceedings in the Court of Appeals on Appellant's petition for rehearing en banc in the light of the opinion of the Western Pacific case. Therefore, as pointed out above, the sole and only question now for consideration by this court on appellant's second petition for writ of certiorari is whether the Court of Appeals conformed to the mandate. Insofar as the case at bar is concerned, the Western Pacific case required only two things of the Court of Appeals: First, that the court of appeals, recognizing its power under Sec. 46 (c), establish the responsibility for determining rehearings en banc and, secondly, the action of the Court of Appeals on Appellant's petition for rehearing en banc pursuant to that predetermined responsibility. It readily appears that the Court of Appeals has fully complied with both of these elements. Rule 23 of that court was first amended to provide that a petition for rehearing en banc should be determined by the court as constituted in the original hearing. This delegation of authority was pursuant to the opinion in the Western Pacific case wherein this court stated that the original division could be empowered to pass upon en banc requests. Thereupon and pursuant to rule 23 as amended the division of the Court of Appeals again considered Appellant's petition for rehearing en banc and in its opinion denying the petition stated that "Appellant's petition for rehearing en banc has been considered by the Court" and that "the case should not

be reheard en banc or otherwise." It is therefore clearly apparent that the Court of Appeals has complied in every respect with the mandate of this court. Applicable to this case alone, it follows that no further discussion of other issues is warranted nor material, and consequently no other issue can serve as a ground for the granting of a second writ.

A further point is advanced by Appellant that the rule adopted by the Ninth Circuit is in conflict with the practice of the Third Circuit, and the Court of Appeals for the District of Columbia. We note that this point is not argued, and therefore should probably be ignored. We think this matter can be put to rest by stating that nowhere in the Western Pacific case does there appear any intimation that the procedure adopted by the various Circuits must coincide. To the contrary, within the framework laid down by the Western Pacific case, the individual Circuits are permitted to adopt their own procedures. The validity of our statement is corroborated by the language of the opinion in the Western Pacific case that the statute does not compel the court to adopt any particular procedure governing the exercise of the grant of power to the Court of Appeals to order rehearings:

> "Because Section 46(c) is a grant of power, and nothing more, each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how that power shall be exercised."

Appellant has tried again, in its usual reckless and intemperate manner, to put before this court the purported merits of its side of the case. As heretofore argued, we contend that the *only* questions before this court involve the proceedings subsequent to the issuance of the mandate to the Court of Appeals. Respondent's full and fair statement of facts, and Respondent's full presentation of the case prior to the issuance of the mandate is contained in his brief in opposition to Appellant's initial petition for writ of certiorari.

CONCLUSION

Since the jury's verdict in this case on September 30, 1949, this case has wound its tortuous way through a complete review of the record by the trial judge on motion for new trial, four separate proceedings before the Ninth Circuit, and is presently here on its *second* petition for writ of certiorari. Appellant's tactics would indicate with certainty that its basic and obvious strategy is to exhaust the resources and abilities of the Respondent, and by unfairly prolonging and dragging out this ancient litigation, effect a result favorable to it, which it has not found before the jury, the Court of Appeals, or the Supreme Court of the United States. Time and time again this court has pronounced that there must be an end to litigation. We seriously doubt that Appellant would even reluctantly admit that it has had its "day" in court, but the record cannot be

changed even by it. We respectfully submit that no reason whatever exists for the granting of the writ.

Dated: October 22, 1953.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 321

BRADLEY MINING CO., a corporation,
Petitioner,

vs.

EDWARD H. BOICE,
Respondent.

Reply Brief of Petitioner

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 321

BRADLEY MINING CO., a corporation, *Petitioner,*

vs.

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Reply Brief of Petitioner

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondent's brief in opposition ignores completely the merits of the Petition for Writ of Certiorari despite the fact that the petition presents a situation which has been termed "a very thin case * * * whipped into a monstrosity" —posing "an important federal question relating to the function of a trial judge"—in which "both the trial judge and the judges of this [circuit] court have simply refused to function."[1]

1. See Judge Pope's comments Appendix A, p. 18; Appendix C, pp. 3, 5 (opinion rendered after remand by this Court).

Respondent argues that this proceeding is limited to matters subsequent to the issuance of this Court's mandate and that the Court of Appeals complied with the mandate. We submit that neither of these comments is supportable.

CONSIDERATION OF MERITS NOT FORECLOSED

The principal point made by respondent is that this Court having granted certiorari (without limitation) and reversed the order of the court below denying a hearing en banc, without consideration of the merits, a second petition for certiorari to review the decision on the merits is foreclosed. What respondent has neglected to notice is that the rule relied upon is the rule which applies only when, upon the first appeal, the merits are passed upon.[2]

It is readily apparent that in the case at bar this Court did not pass upon the merits. If it had, and the meaning of its decision is that upon the merits the Court of Appeals for the Ninth Circuit was in error and was reversed, then that court has not complied with the decree of this Court, for rather than deny the hearing en banc the judgment of the District Court should have been reversed. Upon the other hand, if the meaning of this Court's decision were that on the merits the judgment below was correct, then its order vacating denial of the petition for hearing en banc and directing that it be considered in the light of the

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2. The procedure relating to certiorari was established by the Act of March 3, 1891. Most of the authorities cited by respondent were decided long prior to the Act. Respondent's cases determined since 1891 are not in point, as in those cases this Court had actually passed upon the merits.

Western Pacific Case[3] was worse than an idle act, it was a contradiction in terms, because if the merits had been passed upon by this Court and no error were found there was nothing which the court below could do either en banc or otherwise.

The fact is that the decision of this Court was not on the merits, but on a matter of procedure and the actual holding was that the court below, in its denial of the petition for hearing en banc, had so far departed from the proper course of proceeding that its order must be vacated and the petition set at large, undetermined. In this posture the case was not ripe to be presented for review until the petition for hearing en banc was properly passed upon and, through the avenues of proper procedure denied or granted, in which event, if a hearing en banc were had, the questions on the merits which were presented might well disappear by a reversal of the judgment by the court sitting en banc. In the circumstances this Court was not in position to pass on the merits and did not pass on the merits.

The precise question presented has not been presented before for the simple reason that the matter decided in the *Western Pacific Case* and this case—the appropriate procedure to be pursued when an application was made to the United States Court of Appeals for hearing en banc,—was an entirely new question. But analogies are provided. In *Honeyman v. Hanan,* 300 U.S. 14, this Court remanded a cause to a state court for further proceedings to the end that uncertainty might be removed and the precise nature

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3. Since the action of this Court in 345 U.S. 247, the Western Pacific Railroad Corporation has recently filed its Petition for Writ of Certiorari (No. 441—October Term, 1953—filed October 26, 1953.).

of a claimed federal question, and how it arose, disclosed, i.e. for the court below to complete its functions. After further proceedings in the state court the matter again came before this Court in *Honeyman v. Hanan,* 302 U.S. 375, where the appeal was dismissed, not because the merits had been passed upon but because, on a clarification of the record, it appeared that the claimed federal question was not substantial. In *Railroad Commission v. Maxcy,* 281 U.S. 82, this Court set aside a decree and remanded the cause with directions to make findings of fact and conclusions of law and then enter a decree thereon. This was done and this Court then assumed jurisdiction of the cause and affirmed the decree in *Railroad Commission v. Maxcy,* 282 U.S. 249. *United States v. Archer,* 241 U.S. 119, 132, was remanded "for more particular findings" and was then affirmed by an equally divided court in *Archer v. United States,* 251 U.S. 548.[4]

The only thing this Court's mandate in the case at bar did was to direct the court below **properly** to complete its functions by proper disposition of the petition for hearing en banc. Not until then would its decision be final and ripe for review. The mandate said nothing of the merits. The petition here is not to review a decision rendered on the mandate but one rendered before the mandate, not touched upon in the mandate—which set the merits at large by re-

4. To the same effect *Fidelity & D. Co. v. United States,* 259 U.S. 296, affirmed, after further proceedings below, in *United States v. Fidelity & D. Co.,* 266 U.S. 587; *Fox v. Gulf Ref. Co.,* 295 U.S. 75, and *Gulf Ref. Co. v. Fox,* 297 U.S. 381; *United States v. Ballard,* 322 U.S. 78, and *Ballard v. United States,* 329 U.S. 187 (where this Court reversed because it did not have the benefit of the views of the court below on a question involved and on learning those views disagreed and reversed again).

instating the petition for hearing en banc—and to review action below which, we submit, failed to comply with the mandate. The court below "may consider and decide any matters left open by the mandate of this Court" and these matters may be reviewed on new proceedings in this Court. In re *Sanford etc. Co.*, 160 U.S. 247.[5]

PROCEEDINGS BELOW AFTER MANDATE

We submit, as above, that not only are the merits before this Court, by virtue of the petition, but also that the Court below did not comply with the decision of this Court in the *Western Pacific Case.*

Prior to the *Western Pacific* decision, it had been the practice of the Ninth Circuit either to strike a petition for rehearing en banc or for the panel which heard the case to dispose of such petitions without any circularization of the petition among the active members of the Court. We submit that all the Court below has done by its amended Rule 23 has been to formalize its earlier practice which was held to be improper by this Court. It is the plain miscarriage of justice demonstrated in the case at bar which points up the vice of a rule *conditioning* consideration of a hearing en banc on the granting of a rehearing by the division which decided, improperly as we believe, the case on the original hearing in the division. This point was clearly made in the pending petition (p. 18, et seq.) and respondent in the brief in opposition has simply refused to meet the issue.

Further discussion here would only repeat what was said

5. Cf. *Hinckley v. Morton*, 103 U.S. 764; *Charles Wolff Packing Co. v. Court of Industrial Relations*, 267 U.S. 552, 562; *Sprague v. Ticonic National Bank*, 307 U.S. 161, 168; *Transparent-Wrap. etc. Corp. v. Stokes & Smith Co.*, 329 U.S. 637, 648.

in our petition, except that it can be added that Judge Pope, in his dissent in the *Western Pacific Case,* after remand of that case to the Court of Appeals, points out that the Court's new Rule 23 has precisely the improper confining condition that we have noticed (see Petition for Certiorari filed by Western Pacific Railroad Corporation in this Court, October 26, 1953—No. 441 October Term 1953—at p. 9).

Since the above mentioned petition of the Western Pacific case has been filed in this Court, we think it would be improper for us to comment on what happened in that case – a statement of what occurred and comments thereon are properly for counsel for the petitioner in that case.

Respondent's brief in opposition does not attempt to meet the point raised in the pending petition, page 20 et seq. —emphasized in Judge Pope's second dissent (Appendix B) which went upon the ground, in effect, that under a proper rule which called the matter to the attention of the majority of the Court—a hearing en banc would properly have resulted, because, in his view, on a rehearing en banc the judgment would be reversed. See Appendix B, p. 3:

> "• • • my views are based upon the demonstrable probability that were this case heard by all seven judges, a different result would be achieved. A study of the views expressed by all seven of the judges in Southern Pacific Company v. Guthrie, 186 F.2d 926, (1951), will disclose why I think it is evident that a hearing in bank would produce a different result."

Nor has respondent attempted to meet the remaining questions raised in the petition at bar. In view of the result which Judge Pope has termed "a monstrosity" (Appendix A, p. 18), in his third dissent he states, "The question is

whether a litigant in a federal court is entitled to have the judges, both trial and appellate, exercise their constitutional power, and perform their duty, to pass judgment * * * it poses an important federal question relating to the function of a trial judge * * * As I see it, both the trial judge and the judges of this [circuit] court have simply refused to function." (Appendix C, pp. 3, 5.)

In the above connection, see the pending petition p. 21 et seq.

CONCLUSION

We respectfully submit that this Court should issue its writ of certiorari as prayed.

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